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THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2015 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through April 3, 2015. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through April 3, 2015.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
John Marshall Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2015 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2015 supplement pamphlets and in the bound volumes of the Code.

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TITLE 17

CRIMINAL PROCEDURE

Chap.

CHAPTER 1

GENERAL PROVISIONS

17-1-4. Vacation of judgments, verdicts, rules, or orders obtained by perjury.

JUDICIAL DECISIONS

ANALYSIS

MOTIONS

Motions

When motion to vacate fails.

Defendant was not entitled to have the defendant's convictions set aside due to alleged perjured testimony as the defendant made no showing any perjury actually occurred. Coggins v. State, 293 Ga. 864, 750 S.E.2d 331 (2013).

CHAPTER 2

JURISDICTION AND VENUE

17-2-1. Jurisdiction over crimes and persons charged with commission of crimes generally.

JUDICIAL DECISIONS

Jurisdiction established. — State had jurisdiction to prosecute the defendant for computer child exploitation because the evidence showed that after being told that the person the defendant thought was a 14-year-old girl lived in Georgia, the defendant violated O.C.G.A. § 16-12-100.2 by utilizing computer on-line services to communicate with the purported child and entice the child to meet the defendant to engage in sexual activity. Brown v. State, 321 Ga. App. 798, 743 S.E.2d 474 (2013).

State had jurisdiction to prosecute the defendant for attempted child molestation, because the defendant committed the crime at least partly within Georgia when the defendant took a substantial step in Georgia toward committing child molestation, namely by traveling to Georgia to meet with a person the defendant thought was a 14-year-old girl for the purpose of engaging in sexual activity. Brown v. State, 321 Ga. App. 798, 743 S.E.2d 474 (2013).

17-2-2. Venue generally.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Location of crime is clear. — For purposes of the aggravated battery — family violence offense and other offenses occurring in the parties' home, venue was proper in Athens-Clarke County because one of the responding officers of the Athens-Clarke County Police Department directly testified that the house where the defendant and the victim lived was located in Athens-Clarke County. Jones v. State, 329 Ga. App. 439, 765 S.E.2d 639 (2014).

Because the victim's body was discovered in Douglas County, Georgia, and the county in which the cause of death was inflicted could not be determined, venue for the murder charge against both of the defendants was proper in Douglas County. Perera v. State, 295 Ga. 880, 763 S.E.2d 687 (2014).

County where vehicle first spotted in county of venue.

With respect to the offenses relating to or arising out of the police chase, including the offense of fleeing and attempting to elude police officers, venue was proper in Athens-Clarke County because, although the defendant drove through other counties, the police chase began in Athens-Clarke County, and there was testimony that the defendant's vehicle traveled in Athens-Clarke County during the course of the police chase. Jones v. State, 329 Ga. App. 439, 765 S.E.2d 639 (2014).

Proof of Venue

Evidence as to venue, though slight, may be sufficient.

With regard to the defendant's murder conviction, sufficient evidence was submitted to support the conclusion that the cause of the victim's death was a beating

involving blows to the head and while no direct evidence was presented establishing where the beating was committed, sufficient indirect or circumstantial evidence was presented from which the jury could conclude the victim was beaten at the pull-off on a road in Harris County, Georgia, where the victim was found. Bulloch v. State, 293 Ga. 179, 744 S.E.2d 763 (2013).

Venue proved where evidence indicates crime committed in trial county.

Since there was no clear evidence that the fatal injury was inflicted anywhere other than Harris County, where the victim was found, and where the victim died, the state sufficiently proved venue. Walton v. State, 293 Ga. 607, 748 S.E.2d 866 (2013).

Body found in county, although shooting site unconfirmed.

Police officer's testimony that the burning car in which the victim's body was found was located in Fulton County was sufficient to establish venue in that county. Jackson v. State, 292 Ga. 685, 740 S.E.2d 609 (2013).

Venue in a murder case was proper.

Since the defendant conceded that the homicide was committed in a moving vehicle and the victim's body was found in Houston County, and there was no evidence that the fatal injury was inflicted anywhere other than Houston County, the state sufficiently proved venue as to the murder. Faulkner v. State, 295 Ga. 321, 758 S.E.2d 817 (2014).

Venue needs clear proof beyond reasonable doubt.

Jury instructions set forth in O.C.G.A. § 17-2-2(c) violated the habeas petitioner's due process rights since Ga. Const. 1983, Art. VI, Sec. II, Para. V made venue an essential element of malice murder, and the instruction's mandate that jurors had to consider the cause of death to have occurred where the body was found improperly shifted the burden of proving otherwise onto the defendant. Owens v. McLaughlin, 733 F.3d 320 (11th Cir. 2013).

Evidence insufficient to establish venue.

State failed to present evidence of venue necessary for a fleeing and eluding conviction, as the testimony merely identified streets, but did indicate the counties in which the chase or shooting took place. Grant v. State, 326 Ga. App. 121, 756 S.E.2d 255 (2014).

Sufficient evidence supported the defendant's conviction for theft by taking since the evidence showed that the defendant never used the funds borrowed for relocating the Florida plant, as promised, and the loan was secured with equipment that the defendant did not own; however, the prosecution failed to prove venue was proper in Dodge County, Georgia, since although the contracts were executed in Dodge County, there was no evidence that the defendant exercised any control over the $ 350,000 in Dodge County. Davis v. State, 326 Ga. App. 279, 754 S.E.2d 815 (2014).

Defendant's conviction for making a false statement in violation of O.C.G.A. § 16-10-20 was reversed on appeal because the state offered no proof that the jail where the alleged statement was made was in a particular county and since the defendant was also driven, the false statement may have been made in another county. Stockard v. State, 327 Ga. App. 184, 755 S.E.2d 548 (2014).

Since the state failed to present circumstantial evidence supporting a finding that the defendant and the victim entered Fulton County, the jury had no basis to apply O.C.G.A. § 17-2-2(h). State v. Robertson, 329 Ga. App. 182, 764 S.E.2d 427 (2014).

Stipulating to venue. — Pretermitting whether the decisions not to move for a directed verdict for lack of venue and to stipulate to venue fell below the objective standard of reasonableness, the defendant could not prove that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Indeed, if defense counsel either moved for a directed verdict as to the lack of venue or decided against ultimately stipulating to venue, the trial transcript clearly showed that the state was prepared to reopen the evidence to recall a witness to prove venue. Muldrow v. State, 322 Ga. App. 190, 744 S.E.2d 413 (2013).

Proof of Venue (Cont'd)

Venue a question of fact for the jury.

Whether the state established venue was a question for a jury because the question of whether the defendant's efforts to abandon the illegal files was successful when the defendant placed the files in the trash before entering Clayton County could not be determined as a matter of law at the pretrial stage. State v. Al-Khayyal, 322 Ga. App. 718, 744 S.E.2d 885 (2013).

17-2-3. Jurisdiction and venue as to crimes committed on boundary lines between this state and other states.

JUDICIAL DECISIONS

Trial counsel was not ineffective for failing to challenge venue as such a motion would have failed given the evidence supporting a finding that the fatal gunshot was inflicted on the Georgia side of the bridge before the defendant threw the body into the river. McDonald v. State, 296 Ga. 643, 770 S.E.2d 6 (2015).

CHAPTER 3

LIMITATIONS ON PROSECUTION

17-3-1. Generally.

JUDICIAL DECISIONS

Analysis

General Consideration
Limitation Period Application

General Consideration

Cited in Davis v. State, 323 Ga. App. 266, 746 S.E.2d 890 (2013); Bighams v. State, 296 Ga. 267, 765 S.E.2d 917 (2014).

Limitation Period Application

Four year statute of limitations.

Trial court correctly concluded that the four-year statute of limitation contained in O.C.G.A. § 17-3-1(c) was applicable and that the state failed to plead and prove that the tolling provisions of O.C.G.A. § 17-3-2.2 had been triggered. Consequently, the trial court did not err in granting defendants' plea in bar. State v. Mullins, 321 Ga. App. 671, 742 S.E.2d 490 (2013).

Defendant's convictions for theft by conversion and a RICO violation were reversed because the state failed to carry the state's burden to prove that the defendant was indicted on the counts within the applicable statutes of limitation as the evidence showed that the victims, and therefore the state, had actual knowledge of the offenses more than five years prior to the June 12, 2009 indictment, and the state produced no evidence or argument to the contrary. Jannuzzo v. State, 322 Ga. App. 760, 746 S.E.2d 238 (2013).

Limitations period properly tolled.

Because the existence, execution, and timing of an agreement that allegedly violated the bribery statute were unknown to the state before February 2010, the statute of limitations for the bribery charge was tolled until it was discovered; and the trial court did not err by denying the defendant's plea in bar based on the

expiration of the statute of limitation. Kenerly v. State, 325 Ga. App. 412, 750 S.E.2d 822 (2013).

Because the tolling exception to the statute of limitation applied to the failure to disclose a financial interest charge, and the prosecution for that charge was timely commenced after the crime was discovered, the trial court did not err by denying the defendant's plea in bar based on the expiration of the statute of limitation. Kenerly v. State, 325 Ga. App. 412, 750 S.E.2d 822 (2013).

No extension of time. — Georgia Court of Appeals properly concluded that O.C.G.A. § 17-3-3 did not give the state six additional months to obtain a second indictment against the appellee for felony vehicular homicide (FVH) after the state's unsuccessful attempt to appeal the dismissal of the FVH count of the first indictment as the appeal did not stay any time limit and the FVH count of the second indictment did not relate back to the date of the first indictment since only a misdemeanor was pending at that point. State v. Outen, 296 Ga. 40, 764 S.E.2d 848 (2014).

17-3-2. Periods excluded.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Knowledge of victim as knowledge of state.

Defendant's convictions for theft by conversion and a RICO violation were reversed because the state failed to carry the state's burden to prove that the defendant was indicted on the counts within the applicable statutes of limitation as the evidence showed that the victims, and therefore the state, had actual knowledge of the offenses more than five years prior to the June 12, 2009 indictment, and the state produced no evidence or argument to the contrary. Jannuzzo v. State, 322 Ga. App. 760, 746 S.E.2d 238 (2013).

Statute of limitations not tolled.

Since two clients did not discover the defendant's theft at the time the theft occurred, the statute of limitations was tolled until discovery and those counts were not barred by the limitations period. Pennington v. State, 323 Ga. App. 92, 746 S.E.2d 768 (2013).

Statute of limitation tolled.

Because the existence, execution, and timing of an agreement that allegedly violated the bribery statute were unknown to the state before February 2010, the statute of limitations for the bribery charge was tolled until it was discovered; and the trial court did not err by denying the defendant's plea in bar based on the expiration of the statute of limitation. Kenerly v. State, 325 Ga. App. 412, 750 S.E.2d 822 (2013).

Because the tolling exception to the statute of limitation applied to the failure to disclose a financial interest charge, and the prosecution for that charge was timely commenced after the crime was discovered, the trial court did not err by denying the defendant's plea in bar based on the expiration of the statute of limitation. Kenerly v. State, 325 Ga. App. 412, 750 S.E.2d 822 (2013).

17-3-2.1. Exclusions for certain offenses involving a victim under 16 years of age.

JUDICIAL DECISIONS

Cited in State v. Outen, 296 Ga. 40, 764 S.E.2d 848 (2014).

17-3-2.2. Statute of limitations.

JUDICIAL DECISIONS

Statute of limitations not tolled. — Trial court correctly concluded that the four-year statute of limitation contained in O.C.G.A. § 17-3-1(c) was applicable and that the state failed to plead and prove that the tolling provisions of O.C.G.A. § 17-3-2.2 had been triggered. Consequently, the trial court did not err in granting defendants' plea in bar. State v. Mullins, 321 Ga. App. 671, 742 S.E.2d 490 (2013).

Cited in State v. Outen, 296 Ga. 40, 764 S.E.2d 848 (2014).

17-3-3. Other exclusions.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

No extension of time. — O.C.G.A. § 17-3-3 did not alter the running of the statute of limitation because the statute had no application to a prosecution in which the charge was dismissed over six months before the original statute of limitations expires. State v. Outen, 324 Ga. App. 457, 751 S.E.2d 109 (2013).

Georgia Court of Appeals properly concluded that O.C.G.A. § 17-3-3 did not give the state six additional months to obtain a second indictment against the appellee for felony vehicular homicide (FVH) after the state's unsuccessful attempt to appeal the dismissal of the FVH count of the first indictment as the appeal did not stay any time limit and the FVH count of the second indictment did not relate back to the date of the first indictment since only a misdemeanor was pending at that point. State v. Outen, 296 Ga. 40, 764 S.E.2d 848 (2014).

CHAPTER 4

ARREST OF PERSONS

Article 2

Arrest by Law Enforcement Officers Generally

Sec.

17-4-23. Procedure for arrests by citation for motor vehicle violations; issuance of warrants for arrest for failure of persons charged to appear in court; bond.

ARTICLE 2

ARREST BY LAW ENFORCEMENT OFFICERS GENERALLY

17-4-20. Authorization of arrests with and without warrants generally; use of deadly force; adoption or promulgation of conflicting regulations, policies, ordinances, and resolutions; authority of nuclear power facility security officer.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Official immunity found.

In an arrest for driving under the influence, the arrestee's false imprisonment claim failed because the officer was entitled to official immunity since the officer was performing a discretionary act when the officer arrested the arrestee; the arrestee's general allegations of malice did not overcome official immunity. Bannister v. Conway, 2013 U.S. Dist. LEXIS 152569 (N.D. Ga. Oct. 23, 2013).

False imprisonment arrest.

Summary judgment was improperly granted in favor of the employer based on the employer procuring the employee's false imprisonment when the employee was arrested by a detective because, although two of the loss prevention officers both averred that neither of the officers encouraged or directed the police to arrest the employee, the officers told a third loss prevention officer that the officers were going to obtain the employee's arrest based on a videotape; there was a conflict in the evidence as to whether the employer directly or indirectly caused the police to arrest the employee; and a question of fact remained regarding whether the detective had probable cause to believe that the employee was involved in the theft or lied when denying being so involved. Smith v. Wal-Mart Stores East, LP, 330 Ga. App. 340, 765 S.E.2d 518 (2014).

Summary judgment was improperly granted to the employer because a question of fact remained as to whether the employer procured the employee's false imprisonment as there was a conflict in the evidence about whether the employer caused the detective to arrest the employee as the evidence did not show as a matter of law that the police made a sufficiently independent investigation of the theft; and because a question of fact remained as to whether the detective had probable cause to arrest the employee in connection with the theft as there was a dispute about whether the employee actually saw a person take the electronics out of a case and failed to report it, giving rise to a reasonable suspicion that the employee was working with the thieves. Smith v. Wal-Mart Stores E., No. A14A1373, 2014 Ga. App. LEXIS 812 (Nov. 21, 2014).

No grounds for challenge to arrest warrant. — Defendant failed to show trial counsel's performance was deficient for failing to challenge the arrest warrant on the basis that the warrant was not properly sworn because the record showed that the defendant was taken into custody and arrested before the warrant was issued and there was a valid, warrantless arrest of the defendant, making the later-issued warrant superfluous; thus, any defect in the arrest warrant was moot,

General Consideration (Cont'd)

and a challenge to the arrest warrant would have been futile. Williams v. State, 326 Ga. App. 784, 757 S.E.2d 448 (2014).

Grounds for Warrantless Arrest

2. Offense Committed in Officer's Presence

When officer sees crime.

Probable cause was a complete defense to an arrestee's false imprisonment claim because the arrest for burglary was made pursuant to exigent circumstances as the suspected offense was committed in the officers' presence or within the officers' immediate knowledge; the officers found the arrestee inside a vacant home and saw that the back door appeared to have been forced open. Gray v. Ector, No. 12-11323, 2013 U.S. App. LEXIS 19261 (11th Cir. Sept. 18, 2013) (Unpublished).

3. Offender Endeavoring to Escape

Deadly force used in pursuing feeing suspected felon. — Officers, who shot and killed a fleeing suspected felon armed with a knife, were entitled to official immunity because it was a discretionary act, during pursuit a bystander twice identified the suspect, and the suspect slashed a knife at one officer, posing an immediate threat of physical violence. Williams v. Boehrer, No. 12-14534, 2013 U.S. App. LEXIS 18742 (11th Cir. Sept. 10, 2013) (Unpublished).

Authority of Local Officers

Statute did not apply to rules governing suspects already in custody. — Police officer was properly suspended for using a choke-hold on a handcuffed suspect in violation of department rules; O.C.G.A. § 17-4-20(d), prohibiting local rules that limited an officer's abilities to apprehend suspects, did not apply because the officer was not apprehending the suspect, but was trying to recover evidence from the defendant's mouth. Mercure v. City of Atlanta Civil Service Board, 327 Ga. App. 840, 761 S.E.2d 393 (2014).

17-4-23. Procedure for arrests by citation for motor vehicle violations; issuance of warrants for arrest for failure of persons charged to appear in court; bond.

(a) A law enforcement officer may arrest a person accused of violating any law or ordinance governing the operation, licensing, registration, maintenance, or inspection of motor vehicles or violating paragraph (2), (3), or (5) of subsection (a) of Code Section 3-3-23 by the issuance of a citation, provided that the offense is committed in his presence or information constituting a basis for arrest concerning the operation of a motor vehicle or a violation of paragraph (2), (3), or (5) of subsection (a) of Code Section 3-3-23 was received by the arresting officer from a law enforcement officer observing the offense being committed, except that, where the offense results in an accident, an investigating officer may issue citations regardless of whether the offense occurred in the presence of a law enforcement officer. The arresting officer shall issue to such person a citation which shall enumerate the specific charges against the person and the date upon which the person is to appear and answer the charges or a notation that the person will be later notified of the date upon which the person is to appear and answer the charges. Whenever an arresting officer makes an arrest concerning the operation of a motor vehicle based on information received from another law enforcement officer who observed the

offense being committed, the citation shall list the name of each officer and each must be present when the charges against the accused person are heard.

(b) If the accused person fails to appear as specified in the citation, the judicial officer having jurisdiction of the offense may issue a warrant ordering the apprehension of the person and commanding that he be brought before the court to answer the charge contained within the citation and the charge of his failure to appear as required. The person shall then be allowed to make a reasonable bond to appear on a given date before the court. (Ga. L. 1969, p. 759, § 1; Ga. L. 1975, p. 874, §§ 1-4; Ga. L. 2015, p. 1212, § 2/SB 160.)

The 2015 amendment, effective July 1, 2015, in subsection (a), in the first sentence, inserted "or violating paragraph (2), (3), or (5) of subsection (a) of Code Section 3-3-23", inserted "that", and inserted "or a violation of paragraph (2), (3), or (5) of subsection (a) of Code Section 3-3-23", and, in the second sentence, inserted "or a notation that the person will be later notified of the date upon which the person is to appear and answer the charges".

JUDICIAL DECISIONS

When physical arrest permitted.

Trial court did not err by refusing to suppress the defendant's blood-test results based on not being under arrest prior to being read Georgia's Implied Consent notice because although the defendant's recollection differed from that of the law-enforcement officer, and although defense counsel cross-examined the officer extensively as to alleged inconsistencies in the chronology of events, the officer testified that the officer issued citations to the defendant before reading Georgia's Implied Consent notice. Chernowski v. State, 330 Ga. App. 702, 769 S.E.2d 126 (2015).

ARTICLE 3

WARRANTS FOR ARREST

17-4-40. Persons who may issue warrants for arrest of offenders against penal laws; warrants requested by others; persons who may issue warrants for arrest of law enforcement or peace officers or school teachers or administrators.

JUDICIAL DECISIONS

ANALYSIS

WARRANT APPLICATION HEARINGS.

Warrant Application Hearings.

Warrant application hearing not required. — Record supported a district court's decision granting summary judgment in favor of sheriff's deputies in an action an arrestee filed under 42 U.S.C. § 1983 alleging, inter alia, that the deputies violated the arrestee's constitutional rights by procuring an arrest warrant without probable cause and in violation of

Warrant Application Hearings. (Cont'd)

O.C.G.A. § 17-4-40, and using excessive force during an illegal arrest; because a deputy who obtained the arrest warrant was a law enforcement officer, the official who issued the warrant was not required to hold a preliminary warrant application hearing pursuant to § 17-4-40. Smith v. Mercer, No. 13-13776, 2014 U.S. App. LEXIS 13597 (11th Cir. July 14, 2014) (Unpublished).

Challenge to arrest warrant unwarranted. — Defendant failed to show trial counsel's performance was deficient for failing to challenge the arrest warrant on the basis that it was not properly sworn because the record showed that the defendant was taken into custody and arrested before the warrant was issued and there was a valid, warrantless arrest of defendant, making the later-issued warrant superfluous; thus, any defect in the arrest warrant was moot, and a challenge to the arrest warrant would have been futile. Williams v. State, 326 Ga. App. 784, 757 S.E.2d 448 (2014).

CHAPTER 5

SEARCHES AND SEIZURES

Article 2
Searches With Warrants

Article 3
Disposition of Property Seized

ARTICLE 2
SEARCHES WITH WARRANTS

17-5-21. Grounds for issuance of search warrant; scope of search pursuant to search warrant; issuance by retired judge or judge emeritus.

(a) Upon the written complaint of any certified peace officer of this state or its political subdivisions charged with the duty of enforcing the

criminal laws and otherwise as authorized in Code Section 17-5-20 under oath or affirmation, which states facts sufficient to show probable cause that a crime is being committed or has been committed and which particularly describes the place or person, or both, to be searched and things to be seized, any judicial officer authorized to hold a court of inquiry to examine into an arrest of an offender against the penal laws, referred to in this Code section as "judicial officer," may issue a search warrant for the seizure of the following:

(1) Any instruments, articles, or things, including the private papers of any person, which are designed, intended for use, or which have been used in the commission of the offense in connection with which the warrant is issued;

(2) Any person who has been kidnapped in violation of the laws of this state, who has been kidnapped in another jurisdiction and is now concealed within this state, or any human fetus or human corpse;

(3) Stolen or embezzled property;

(4) Any item, substance, object, thing, or matter, the possession of which is unlawful; or

(5) Any instruments, articles or things, any information or data, and anything that is tangible or intangible, corporeal or incorporeal, visible or invisible evidence of the commission of the crime for which probable cause is shown, other than the private papers of any person.

(b) When the peace officer is in the process of effecting a lawful search, nothing in this Code section shall preclude such officer from discovering or seizing any stolen or embezzled property, any item, substance, object, thing, or matter, the possession of which is unlawful, or any item, substance, object, thing, or matter, other than the private papers of any person, which is tangible evidence of the commission of a crime against the laws of this state, the United States, or another state. Other personnel, sworn or unsworn, acting under the direction of a peace officer executing a search warrant may assist in the execution of such warrant. While in the process of effecting a lawful arrest or lawful search, nothing in this Code section nor in Code Section 16-11-62 shall be construed to preclude the use of any device, as such term is defined in Code Section 16-11-60, by the peace officer executing the search warrant or other personnel assisting in the execution of such warrant.

(c) Any retired judge or judge emeritus of a state court may issue search warrants as authorized by this Code section if authorized in writing to do so by an active judge of the state court of the county wherein the warrants are to be issued.

(d) Notwithstanding any provisions of Code Section 17-5-20 or other provisions of this Code section to the contrary, with respect to the

execution of a search warrant by a certified peace officer employed by a university, college, or school, which search warrant will be executed beyond the arrest jurisdiction of a campus policeman pursuant to Code Section 20-3-72, the execution of such search warrant shall be made jointly by the certified peace officer employed by a university, college, or school and a certified peace officer of a law enforcement unit of the political subdivision wherein the search will be conducted. (Ga. L. 1966, p. 567, § 3; Ga. L. 1985, p. 1105, § 2; Ga. L. 1990, p. 1980, §§ 2, 3; Ga. L. 2015, p. 1046, § 3/SB 94.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of paragraph (a)(5) for the former provisions, which read: "Any item, substance, object, thing, or matter, other than the private papers of any person, which is tangible evidence of the commission of the crime for which probable cause is shown."; and, in subsection (b), in the first sentence, substituted "shall preclude such officer" for "shall be construed to preclude him" near the beginning and added ", the United States, or another state." at the end and added the last two sentences.

Law reviews. — For annual survey on criminal law, see 65 Mercer L. Rev. 79 (2013).

JUDICIAL DECISIONS

Analysis

Sufficiency of Warrant

1. Technical Requirements for Affidavit

Insufficient corroboration of anonymous informant. — Given the complete lack of information regarding the anonymous informant, the informant's motives, or the basis for the informant's knowledge, the informant's allegations, standing alone, were insufficient to establish probable cause for the search of the defendant's home and, thus, the trial court erred in denying the defendant's motion to suppress evidence discovered during a search of the defendant's home. Wiggins v. State, 331 Ga. App. 447, 771 S.E.2d 135 (2015).

2. Probable Cause

Basis for determining if sufficient probable cause.

Denial of the defendant's suppression motion was error as a search warrant was based upon the statements of a confidential informant (CI) whose reliability, credibility, and source of information were unknown, law enforcement officers had failed to corroborate the CI's claim that the defendant was selling drugs from the residence, and the officers did not observe the CI's conduct before or after the controlled buy. Chatham v. State, 323 Ga. App. 51, 746 S.E.2d 605 (2013).

Evidence held sufficient to establish probable cause.

Information from two neighbors that a jonboat had been stolen from another neighbor and that two men had been seen spray painting a jonboat and removing the jonboat's identifying numbers at the house next door, coupled with an officer's observation of the jonboat and the officer's comparison with a photo of the stolen boat, justified issuance of a search warrant. A tackle box that was improperly removed would have inevitably been discovered. State v. Kaulbach, 331 Ga. App. 610, 771 S.E.2d 245 (2015).

Trial counsel was not ineffective in failing to object to the admission of evidence

of clothing, a mask, and a television seized from the defendant's apartment because probable cause existed for a search warrant as the magistrate had a substantial basis to determine that there was a fair probability that evidence of a crime would be found in the defendant's apartment because the police caught the defendant peeping into a woman's apartment in the area where the police believed a serial sexual offender was operating, and the defendant lied, falsely claiming to be spying on a girlfriend; the first victim testified that the perpetrator stole a television; and the defendant matched the description of the perpetrator given by two of the victims. Baxter v. State, 329 Ga. App. 589, 765 S.E.2d 738 (2014).

17-5-22. Issuance of search warrants by judicial officers generally; maintenance of docket record of warrants issued.

All warrants shall state the time and date of issuance and are the warrants of the judicial officer issuing the same and not the warrants of the court in which he is then sitting. Such warrants need not bear the seal of the court or clerk thereof. The warrant, the complaint on which the warrant is issued, the affidavit or affidavits supporting the warrant, and the returns shall be filed with the clerk of the court of the judicial officer issuing the same, or with the court if there is no clerk, at the time the warrant has been executed or has been returned "not executed"; provided, however, that the judicial officer shall keep a docket record of all warrants issued by him, and upon issuing any warrant he shall immediately record the same, within a reasonable time, on the docket. (Ga. L. 1966, p. 567, § 4; Ga. L. 1992, p. 1328, § 1; Ga. L. 2014, p. 866, § 17/SB 340.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, inserted "that" in the proviso and revised punctuation.

17-5-25. Execution of search warrant generally.

JUDICIAL DECISIONS

Subsequent test or analysis of seized item. — In a sexual exploitation of children case, a defendant's computer was seized within 10 days of the issuance of a warrant as required by O.C.G.A. § 17-5-25; there was no requirement that the analysis and examination of the computer take place within the ten-day period. Mastrogiovanni v. State, 324 Ga. App. 739, 751 S.E.2d 536 (2013).

Cited in Brown v. State, 330 Ga. App. 488, 767 S.E.2d 299 (2014).

17-5-30. Motion to suppress evidence illegally seized generally.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Good-faith exception inapplicable.

Trial court did not err in granting the defendant's motion to suppress because the only possible justification for the search and seizure involving the defendant was the officers' good-faith belief that the defendant was on probation and subject to a valid Fourth Amendment waiver; however, that option was foreclosed by case law as Georgia did not recognize a good faith exception to the exclusionary rule. State v. New, 331 Ga. App. 139, 770 S.E.2d 239 (2015).

Standing.

Because there was no evidence that the defendant was a subscriber of the phones tapped and no evidence that the defendant's voice was heard during the wiretapped conversations, the defendant lacked standing to seek suppression of the conversations from those wiretaps. Deleon-Alvarez v. State, 324 Ga. App. 694, 751 S.E.2d 497 (2013).

Failure to file motion did not constitute ineffective assistance of counsel.

Motion to remand for a hearing to determine if the defendant had standing or if trial counsel was ineffective for failing to move for suppression of the wiretaps was denied because the defendant lacked standing to seek suppression of the evidence from the wiretaps. Deleon-Alvarez v. State, 324 Ga. App. 694, 751 S.E.2d 497 (2013).

Because the defendant's lawyer elicited testimony from the prosecution witnesses that the defendant was never identified as an owner or subscriber of the three targeted cell phones monitored, nor was the defendant ever identified as a participant of the intercepted conversations, the defendant did not have standing to pursue suppression of the wiretap evidence, and neither the defendant's trial counsel nor counsel on a motion for new trial performed deficiently for failing to raise the suppression issue. Deleon-Alvarez v. State, 324 Ga. App. 694, 751 S.E.2d 497 (2013).

Searches

4. Inventory Search

Inventory search pursuant to standard procedure. — Because the impoundment of the vehicle the defendant had been driving was reasonable and there was evidence to support the trial court's finding that the inventory search, during which bags containing marijuana and cocaine were found, was conducted pursuant to standard police procedure, the trial court's denial of the motion to suppress was not improper. Askew v. State, 326 Ga. App. 859, 755 S.E.2d 283 (2014).

Informants

Suppression required if informant unreliable.

Denial of the defendant's suppression motion was error as a search warrant was based upon the statements of a confidential informant (CI) whose reliability, credibility, and source of information were unknown, law enforcement officers had failed to corroborate the CI's claim that the defendant was selling drugs from the residence, and the officers did not observe the CI's conduct before or after the controlled buy. Chatham v. State, 323 Ga. App. 51, 746 S.E.2d 605 (2013).

Applicability

1. In General

Evidence arising from first level

police-citizen encounter.

Trial court erred in denying the defendant's motion to suppress because the officer lacked reasonable suspicion of criminal activity for an investigatory stop, the defendant's exercise of the right to avoid a first-tier encounter was not relevant to whether the officer had reasonable suspicion of criminal activity, and items the defendant discarded during flight were related to the illegal detention and inadmissible. Walker v. State, 323 Ga. App. 558, 747 S.E.2d 51 (2013).

Motion to suppress properly denied.

Motion to suppress was properly denied as the trial court did not err in concluding that the officer had reasonable suspicion that the driver was, or was about to be, engaged in criminal activity because the burglary to which the officer responded appeared to be in progress given that someone apparently intended to come back for the air-conditioning units stacked by the open door into the premises; the hour was late, the businesses were closed, and there was no reason for anyone to be driving to the businesses or to the empty properties; the driver was in a pick-up truck capable of transporting several air-conditioning units; and the driver quickly retreated when the driver saw the police car. The above factors were sufficient to give the officer a particularized and objective basis for a reasonable suspicion to stop the vehicle and to investigate. Waldron v. State, 321 Ga. App. 246, 741 S.E.2d 301 (2013).

Search and seizure not valid when defendant no longer on probation. — Trial court did not err in granting the defendant's motion to suppress because, given that the defendant was no longer a probationer and had not waived the defendant's Fourth Amendment rights, the warrantless searches and seizures were not valid. State v. New, 331 Ga. App. 139, 770 S.E.2d 239 (2015).

5. Vehicles

C. Searches

Consensual automobile search.

Defendant's motion to suppress was properly denied because the officer had reasonable articulable suspicion to conduct a traffic stop based on an alert from the license-plate recognition system showing that a wanted person could be driving the subject vehicle, the defendant's driving on a suspended license provided probable cause for an arrest, and the defendant consented to a search of the vehicle. Hill v. State, 321 Ga. App. 817, 743 S.E.2d 489 (2013).

D. Traffic Stops

No justification for stop.

Because it was evident that the officer's claim of the tag's condition as being worn and old and appearing more than 30 days out of date, which was the sole articulated basis for the investigatory stop, was found by the trial court to lack credibility, and the appellate court found no clear error in the trial court's credibility determination, the state failed to adduce credible evidence that the officer observed a tag that appeared more than 30 days old, and supplied no basis to disturb the trial court's decision to grant the defendant's motion to suppress. State v. Castillo, 330 Ga. App. 828, 769 S.E.2d 571 (2015).

Warrants and Affidavits

Failure to tender warrant or affidavit. — Trial court erred in denying the defendant's motion to suppress because the state did not carry the state's burden to prove the validity of the warrant in that the affidavit supporting the warrant was not tendered into evidence. Smith v. State, 324 Ga. App. 542, 751 S.E.2d 164 (2013).

Warrant and affidavit in record prior to suppression hearing. — Because the testifying officer had personal knowledge concerning the existence of a valid search warrant and the warrant and supporting affidavit were in the record prior to the suppression hearing, the state met the state's burden of producing evidence showing the validity of the warrant since the defendant offered nothing in opposition, the trial court properly denied the defendant's motion to suppress. Tyre v. State, 323 Ga. App. 37, 747 S.E.2d 106 (2013).

Evidence Acquired Unlawfully

Exigent circumstances not found.

Trial court erred in denying the defen-

Evidence Acquired Unlawfully (Cont'd)

dant's motion to suppress as the back yard and the back door of the defendant's home fell within the general definition of curtilage of the home and the state failed to show an exception, such as exigent circumstances, to the homeowners' Fourth Amendment right to protection of the back yard/door curtilage of the home. Arp v. State, 327 Ga. App. 340, 759 S.E.2d 57 (2014).

Requirements for Motion

2. Writing

Written motion to suppress required.

Appellate court declined to consider the defendant's challenge to the denial of a motion to suppress because the defendant failed to present the arguments to the trial court in the written motion to suppress. Wise v. State, 321 Ga. App. 39, 740 S.E.2d 850 (2013).

Appeals

Failure to request ruling meant waiver on appeal.

Since the defendant did not challenge evidence based on an improper inventory search in the defendant's motion to suppress, the state was not given notice of the issue and the issue was waived on appeal. McBurrows v. State, 325 Ga. App. 303, 750 S.E.2d 436 (2013).

17-5-32. Search and seizure of documentary evidence in possession of attorney; exclusion of illegally obtained evidence.

(a) As used in this Code section, the term "documentary evidence" includes but is not limited to writings, documents, blueprints, drawings, photographs, computer printouts, microfilms, X-rays, files, diagrams, ledgers, books, tapes, audio and video recordings, and papers of any type or description.

(b) Notwithstanding any other provision of law, no search and seizure without a warrant shall be conducted and no search warrant shall be issued for any documentary evidence in the possession of an attorney who is not a criminal suspect, unless the application for the search warrant specifies that the place to be searched is in the possession or custody of an attorney and also shows that there is probable cause to believe that the documentary evidence will be destroyed or secreted in the event a search warrant is not issued. This Code section shall not impair the ability to serve search warrants in cases in which the search is directed against an attorney if there is probable cause to suspect such attorney has committed a crime. This Code section shall not impair the ability to serve subpoenas on nonsuspect attorneys.

(c) In any case in which there is probable cause to believe that documentary evidence will be destroyed or secreted if a search warrant is not issued, no search warrant shall be issued or be executed for any documentary evidence in the possession or custody of an attorney who is not a criminal suspect unless:

(1) At the time the warrant is issued the court shall appoint a special master to accompany the person who will serve the warrant.

The special master shall be an attorney who is a member in good standing of the State Bar of Georgia and who has been selected from a list of qualified attorneys maintained by the State Bar of Georgia. Upon service of the warrant, the special master shall inform the party served of the specific items being sought and that the party shall have the opportunity to provide the items requested. If the party, in the judgment of the special master, fails to provide the items requested, the special master shall conduct a search for the items in the areas indicated in the search warrant;

(2) If the party who has been served states that an item or items should not be disclosed, such item or items shall be sealed by the special master and taken to the superior court for a hearing. At the hearing the party whose premises has been searched shall be entitled to raise any issues which may be raised pursuant to Code Section 17-5-30 as well as claims that the item or items are privileged or claims that the item or items are inadmissible because they were obtained in violation of this Code section. Any such hearing shall be held in the superior court;

(3) Any such warrant must, whenever practicable, be served during normal business hours. The law enforcement officer or prosecutor serving the warrant shall not participate in the search but may accompany the special master when the special master is conducting the search;

(4) Any such warrant must be served upon a party who appears to have possession or control of the items sought. If, after reasonable efforts, the party serving the warrant is unable to locate any such person, the special master shall seal and return to the court for determination by the court any items which appear to be privileged;

(5) Any such warrant shall be issued only by the superior court. At the time of applying for such a warrant, the law enforcement officer or prosecutor shall submit a written search plan designed to minimize the intrusiveness of the search. When the warrant is executed, the special master carrying out the search shall have a duty to make reasonable efforts to minimize the intrusiveness of the search.

(d) Notwithstanding any provision of law to the contrary, evidence obtained in violation of this Code section shall be excluded and suppressed from the prosecution's case-in-chief or in rebuttal, and such evidence shall not be admissible either as substantive evidence or for impeachment purposes. (Code 1981, § 17-5-32, enacted by Ga. L. 1989, p. 1687, § 1; Ga. L. 2014, p. 866, § 17/SB 340.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (d).

ARTICLE 3

DISPOSITION OF PROPERTY SEIZED

17-5-51. Civil forfeiture of weapons used in commission of crime, possession of which constitutes crime or delinquent act, or illegal concealment generally.

Any device which is used as a weapon in the commission of any crime against any person or any attempt to commit any crime against any person, any weapon the possession or carrying of which constitutes a crime or delinquent act, and any weapon for which a person has been convicted of violating Code Section 16-11-126 are declared to be contraband and shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9, notwithstanding the time frames set forth in Code Section 9-16-7. (Ga. L. 1967, p. 749, § 1; Ga. L. 1977, p. 1131, § 1; Ga. L. 1994, p. 963, § 1; Ga. L. 2010, p. 963, § 2-10/SB 308; Ga. L. 2012, p. 1285, § 2/SB 350; Ga. L. 2015, p. 693, § 3-14/HB 233.)

The 2015 amendment, effective July 1, 2015, rewrote this Code section. See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

17-5-52. Disposition of weapons used in commission of crime or delinquent act involving possession; civil forfeiture.

When a final judgment is entered finding a defendant guilty of the commission or attempted commission of a crime against any person or guilty of the commission of a crime or delinquent act involving the illegal possession or carrying of a weapon, any device which was used as a weapon in the commission of the crime or delinquent act shall be turned over by the person having custody of the weapon or device to the sheriff, chief of police, or other executive officer of the law enforcement agency that originally confiscated the weapon or device when the weapon or device is no longer needed for evidentiary purposes. Within one year after receiving the weapon or device, the sheriff, chief of police, or other executive officer of the law enforcement agency shall return or sell the weapon as provided in Code Section 17-5-54, or if the weapon or device is subject to forfeiture, the procedures set forth in Chapter 16 of Title 9 shall be followed notwithstanding the time frames set forth in Code Section 9-16-7. A state attorney seeking forfeiture under this Code section shall commence civil forfeiture proceedings within 60 days of the entry of a final judgment as contemplated by this Code section; the remaining provisions of Chapter 16 of Title 9 shall be applicable. (Ga. L. 1967, p. 749, § 3; Ga. L. 1976, p. 167, § 1; Ga. L. 1994, p. 963, § 2; Ga.

L. 2008, p. 344, § 1/HB 333; Ga. L. 2012, p. 1285, § 3/SB 350; Ga. L. 2015, p. 693, § 3-15/HB 233.)

The 2015 amendment, effective July 1, 2015, rewrote this Code section. See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

17-5-52.1. Disposal of forfeited or abandoned firearms; innocent owners; auctions; record keeping; liability of government entities.

Repealed by Ga. L. 2015, p. 693, § 3-16/HB 233, effective July 1, 2015. See editor's note for applicability.

Code Commission notes. — Former Code Section 17-5-52.1 was repealed effective July 1, 2015, by Ga. L. 2015, p. 693, § 3-16/HB 233. However, Ga. L. 2015, p. 805, § 10/HB 492, effective July 1, 2015, purported to amend subsection (d) of the former Code section to read as follows:

"(d) If an innocent owner of a firearm cannot be located or after proper notification he or she fails to pay for the return of his or her firearm, if the political subdivision is:

"(1) A municipal corporation, it shall dispose of its firearms as provided for in Code Section 36 37 6; provided, however, that municipal corporations shall not have the right to reject any and all bids or to cancel any proposed sale of such firearms, and all sales shall be to persons who are licensed as firearms collectors, dealers, importers, or manufacturers under the provisions of 18 U.S.C. Section 921, et seq. and who are authorized to receive such firearms under the terms of such license. Any political subdivision which disposes of firearms shall use proceeds from the sale of a firearm as are necessary to cover the costs of administering this Code section, with any surplus to be transferred to the general fund of the political subdivision; or

"(2) Not a municipal corporation, the state custodial agency or the political subdivision shall dispose of its firearms by sale at public auction to persons who are licensed as firearms collectors, dealers, importers, or manufacturers under the provisions of 18 U.S.C. Section 921, et seq. and who are authorized to receive such firearms under the terms of such license. A state custodial agency shall retain only such proceeds as are necessary to cover the costs of administering this Code section, with any surplus to be transferred to the general fund of this state, provided that a state custodial agency may be reimbursed for any firearms formerly in use by the state custodial agency that are sold under this Code section." For effect of subsequent amendment of a repealed statute, see Lampkin v. Pike, 115 Ga. 827 (1902).

Editor's notes. — This Code section was based on Code 1981, § 17-5-52.1, enacted by Ga. L. 2012, p. 1285, § 4/SB 350; Ga. L. 2015, p. 5, § 17/HB 90; Ga. L. 2015, p. 805, § 10/HB 492.

Ga. L. 2015, p. 5, § 54(e)/HB 90, not codified by the General Assembly, provides: "In the event of a conflict between a provision in Sections 1 through 53 of this Act and a provision of another Act enacted at the 2015 regular session of the General Assembly, the provision of such other Act shall control over the conflicting provision in Sections 1 through 53 of this Act to the extent of the conflict." Accordingly, the amendment to subsection (d) of this Code section by Ga. L. 2015, p. 5, § 17/HB 90, was not given effect.

Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to

seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

17-5-54. Definitions; disposition of personal property in custody of law enforcement agency.

(a) As used in this Code section, the term:

(1) "Civil forfeiture proceeding" shall have the same meaning as set forth in Code Section 9-16-2.

(2) "Firearm" means any handgun, rifle, shotgun, or similar device or weapon which will or can be converted to expel a projectile by the action of an explosive or electrical charge.

(3) "Law enforcement agency" means a law enforcement agency of this state or a political subdivision of this state, including the Department of Natural Resources.

(4) "Rightful owner" means a person claiming ownership of property which is the subject of a crime or has been abandoned.

(b) This Code section shall not apply to:

(1) Personal property which is the subject of any civil forfeiture proceeding;

(2) Any property which is the subject of a disposition pursuant to Code Sections 17-5-50 through 17-5-53; and

(3) Any abandoned motor vehicle for which the provisions of Chapter 11 of Title 40 are applicable.

(c)(1) Except as provided in Chapter 16 of Title 9, Code Sections 17-5-55 and 17-5-56, and subsection (b) of this Code section, when a law enforcement agency assumes custody of any personal property which is the subject of a crime or has been abandoned, a disposition of such property shall be made in accordance with the provisions of this Code section.

(2) When a final verdict and judgment is entered finding a defendant guilty of the commission of a crime, any personal property used as evidence in the trial shall be returned to the rightful owner of the property within 30 days following the final judgment; provided, however, that if the judgment is appealed or if the defendant files a motion for a new trial and if photographs, videotapes, or other identification or analysis of the personal property will not be sufficient evidence for the appeal of the case or new trial of the case, such personal property shall be returned to the rightful owner within 30 days of the conclusion of the appeal or new trial, whichever occurs last.

(3) Any person claiming to be a rightful owner of property shall make an application to the entity holding his or her property and shall furnish satisfactory proof of ownership of such property and present personal identification. The person in charge of such property may return such property to the applicant. The person to whom property is delivered shall sign, under penalty of false swearing, a declaration of ownership, which shall be retained by the person in charge of the property. Such declaration, absent any other proof of ownership, shall be deemed satisfactory proof of ownership for the purposes of this Code section; provided, however, that with respect to motor vehicles, paragraph (3) of subsection (b) and subsection (f) of this Code section shall govern the return of motor vehicles.

(4) If more than one person claims ownership of property, a court with jurisdiction over the property shall conduct a hearing to determine the ownership of such property.

(d) After a period of 90 days following the final verdict and judgment, when personal property that is in the custody of a law enforcement agency was used as evidence in a criminal trial or was abandoned, it shall be subject to disposition as provided in subsection (e) of this Code section if the property is not a firearm and as provided in subsection (g) of this Code section if the property is a firearm if it is:

(1) No longer needed in a criminal investigation or for evidentiary purposes in accordance with Code Section 17-5-55 or 17-5-56;

(2) Not claimed pursuant to Code Section 17-5-50; and

(3) Not claimed pursuant to subsection (c) of this Code section.

(e) For any unclaimed personal property that is not a firearm, the sheriff, chief of police, or other executive officer of a law enforcement agency shall make application to the superior court for an order to retain, sell, or discard such property. In the application the officer shall state each item of personal property to be retained, sold, or discarded. Upon the superior court's granting an order for the law enforcement agency to retain such property, the law enforcement agency shall retain such property for official use. Upon the superior court's granting an order which authorizes that the property be discarded, the law enforcement agency shall dispose of the property as other salvage or nonserviceable equipment. Upon the superior court's granting an order for the sale of personal property, the officer shall provide for a notice to be placed once a week for four weeks in the legal organ of the county specifically describing each item and advising possible owners of items of the method of contacting the law enforcement agency; provided, however, that miscellaneous items having an estimated fair market value of $75.00 or less may be advertised or sold, or both, in lots. Such notice shall also stipulate a date, time, and place said items will be

placed for public sale if not claimed. Such notice shall also stipulate whether said items or groups of items are to be sold in blocks, by lot numbers, by entire list of items, or separately. Such unclaimed personal property shall be sold at a sale which shall be conducted not less than seven nor more than 15 days after the final advertised notice has been run. The sale shall be to the highest bidder. If such personal property has not been bid on in two successive sales, the law enforcement agency may retain the property for official use or the property will be considered as salvage and disposed of as other county or municipal salvage or nonserviceable equipment. With respect to unclaimed perishable personal property or animals or other wildlife, an officer may make application to the superior court for an order authorizing the disposition of such property prior to the expiration of 90 days.

(f) With respect to a motor vehicle which is the subject of a crime or has been abandoned but which is not the subject of any civil forfeiture proceeding, the law enforcement agency shall be required to contact the Georgia Crime Information Center to determine if such motor vehicle has been stolen and to follow generally the procedures of Code Section 40-11-2 to ascertain the registered owner of such vehicle.

(g)(1) With respect to unclaimed firearms, if the sheriff, chief of police, agency director, or designee of such official certifies that a firearm is unsafe because of wear, damage, age, or modification or because any federal or state law prohibits the sale or distribution of such firearm, at the discretion of such official, it shall be transferred to the Division of Forensic Sciences of the Georgia Bureau of Investigation, a municipal or county law enforcement forensic laboratory for training or experimental purposes, or be destroyed.

(2) Otherwise, an unclaimed firearm:

(A) Possessed by a municipal corporation shall be disposed of as provided for in Code Section 36-37-6; provided, however, that municipal corporations shall not have the right to reject any bids or to cancel any proposed sale of such firearms, and all sales shall be to persons who are licensed as firearms collectors, dealers, importers, or manufacturers under the provisions of 18 U.S.C. Section 921, et seq., and who are authorized to receive such firearms under the terms of such license; or

(B) Possessed by the state or a political subdivision other than a municipal corporation, shall be disposed of by sale at public auction to persons who are licensed as firearms collectors, dealers, importers, or manufacturers under the provisions of 18 U.S.C. Section 921, et seq., and who are authorized to receive such firearms under the terms of such license. Auctions required by this subparagraph may occur online on a rolling basis or at live events, but in no event

shall such auctions occur less frequently than once every 12 months during any time in which the political subdivision or state custodial agency has an inventory of five or more saleable firearms.

(3) If no bids from eligible recipients are received within six months from when bidding opened on a firearm offered for sale pursuant to paragraph (2) of this subsection, the firearm shall be transferred to the Division of Forensic Sciences of the Georgia Bureau of Investigation, a municipal or county law enforcement forensic laboratory for training or experimental purposes, or be destroyed.

(h) Records shall be maintained showing the manner in which each personal property item came into possession of the law enforcement agency, a description of the property, all efforts to locate the owner, any case or docket number, the date of publication of any newspaper notices, and the date on which the property was retained by the law enforcement agency, sold, or discarded. All agencies subject to the provisions of this Code section shall keep records of the firearms acquired and disposed of as provided by this Code section as well as records of the proceeds of the sales thereof and the disbursement of such proceeds in accordance with records retention schedules adopted in accordance with Article 5 of Chapter 18 of Title 50, the "Georgia Records Act."

(i) The proceeds from the sale of personal property by the sheriff or other county law enforcement agency pursuant to this Code section shall be paid into the general fund of the county treasury. The proceeds from the sale of personal property by a municipal law enforcement agency pursuant to this Code section shall be paid into the general fund of the municipal treasury. The proceeds from the sale of personal property by a state agency pursuant to this Code section shall be paid into the general fund of the state.

(j) Neither the state nor any political subdivision of the state nor any of its officers, agents, or employees shall be liable to any person, including the purchaser of a firearm, for personal injuries or damage to property arising from the sale of a firearm under subsection (g) of this Code section unless the state or political subdivision acted with gross negligence or willful or wanton misconduct. (Code 1981, § 17-5-54, enacted by Ga. L. 1991, p. 944, § 1; Ga. L. 1995, p. 909, § 1; Ga. L. 2004, p. 575, § 1; Ga. L. 2012, p. 1285, § 5/SB 350; Ga. L. 2015, p. 693, § 3-17/HB 233.)

The 2015 amendment, effective July 1, 2015, rewrote this Code section. See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

17-5-56. Maintenance of physical evidence containing biological material.

JUDICIAL DECISIONS

Material collected from abortion. — When the defendant was convicted of rape, aggravated child molestation, and enticing a child for indecent purposes, because O.C.G.A. § 17-5-56 applies to physical evidence containing biological material that could identify the perpetrator and is collected at the time of the crime, the statute did not apply to the biological material collected at the victim's abortion more than two months after the crime occurred; and the statute did not apply to the sample collected from the victim's abortion because the sample was contaminated due to the storage procedure used by the medical clinic, not the state, and there was no usable biological material that would relate to the identity of the perpetrator. Davis v. State, 329 Ga. App. 797, 764 S.E.2d 588 (2014).

CHAPTER 6

BONDS AND RECOGNIZANCES

Article 1

General Provisions

Sec.

Article 2

Sureties

PART 1

GENERAL PROVISIONS

PART 2

PROFESSIONAL BONDSMEN

Sec.

Article 3

Proceedings for Forfeiture of Bonds or Recognizances

ARTICLE 1

GENERAL PROVISIONS

17-6-1. Where offenses bailable; procedure; schedule of bails; appeal bonds.

(a) The following offenses are bailable only before a judge of the superior court:

(1) Treason;

(2) Murder;

(3) Rape;

(4) Aggravated sodomy;

(5) Armed robbery;

(5.1) Home invasion in the first degree;

(6) Aircraft hijacking and hijacking a motor vehicle;

(7) Aggravated child molestation;

(8) Aggravated sexual battery;

(9) Manufacturing, distributing, delivering, dispensing, administering, or selling any controlled substance classified under Code Section 16-13-25 as Schedule I or under Code Section 16-13-26 as Schedule II;

(10) Violating Code Section 16-13-31 or Code Section 16-13-31.1;

(11) Kidnapping, arson, aggravated assault, or burglary in any degree if the person, at the time of the alleged kidnapping, arson, aggravated assault, or burglary in any degree, had previously been convicted of, was on probation or parole with respect to, or was on bail for kidnapping, arson, aggravated assault, burglary in any degree, or one or more of the offenses listed in paragraphs (1) through (10) of this subsection;

(12) Aggravated stalking; and

(13) Violations of Chapter 15 of Title 16.

(b)(1) All offenses not included in subsection (a) of this Code section are bailable by a court of inquiry. Except as provided in subsection (g) of this Code section, at no time, either before a court of inquiry, when indicted or accused, after a motion for new trial is made, or while an appeal is pending, shall any person charged with a misdemeanor be refused bail.

(2) Except as otherwise provided in this chapter:

(A) A person charged with violating Code Section 40-6-391 whose alcohol concentration at the time of arrest, as determined by any method authorized by law, violates that provided in paragraph (5) of subsection (a) of Code Section 40-6-391 may be detained for a period of time up to six hours after booking and prior to being released on bail or on recognizance; and

(B) When an arrest is made by a law enforcement officer without a warrant upon an act of family violence or a violation of a criminal family violence order pursuant to Code Section 17-4-20, the person charged with the offense shall not be eligible for bail prior to the arresting officer or some other law enforcement officer taking the arrested person before a judicial officer pursuant to Code Section 17-4-21.

(3)(A) Notwithstanding any other provision of law, a judge of a court of inquiry may, as a condition of bail or other pretrial release of a person who is charged with violating Code Section 16-5-90 or 16-5-91, prohibit the defendant from entering or remaining present at the victim's school, place of employment, or other specified places at times when the victim is present or intentionally following such person.

(B) If the evidence shows that the defendant has previously violated the conditions of pretrial release or probation or parole which arose out of a violation of Code Section 16-5-90 or 16-5-91, the judge of a court of inquiry may impose such restrictions on the defendant which may be necessary to deter further stalking of the victim, including but not limited to denying bail or pretrial release.

(c)(1) In the event a person is detained in a facility other than a municipal jail for an offense which is bailable only before a judge of the superior court, as provided in subsection (a) of this Code section, and a hearing is held pursuant to Code Section 17-4-26 or 17-4-62, the presiding judicial officer shall notify the superior court in writing within 48 hours that the arrested person is being held without bail. If the detained person has not already petitioned for bail as provided in subsection (d) of this Code section, the superior court shall notify the district attorney and shall set a date for a hearing on the issue of bail within 30 days after receipt of such notice.

(2) In the event a person is detained in a municipal jail for an offense which is bailable only before a judge of the superior court as provided in subsection (a) of this Code section for a period of 30 days, the municipal court shall notify the superior court in writing within 48 hours that the arrested person has been held for such time without bail. If the detained person has not already petitioned for bail as

provided in subsection (d) of this Code section, the superior court shall notify the district attorney and set a date for a hearing on the issue of bail within 30 days after receipt of such notice.

(3) Notice sent to the superior court pursuant to paragraph (1) or (2) of this subsection shall include any incident reports and criminal history reports relevant to the detention of such person.

(d) A person charged with any offense which is bailable only before a judge of the superior court as provided in subsection (a) of this Code section may petition the superior court requesting that such person be released on bail. The court shall notify the district attorney and set a date for a hearing within ten days after receipt of such petition.

(e) A court shall be authorized to release a person on bail if the court finds that the person:

(1) Poses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court when required;

(2) Poses no significant threat or danger to any person, to the community, or to any property in the community;

(3) Poses no significant risk of committing any felony pending trial; and

(4) Poses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice.

However, if the person is charged with a serious violent felony and has already been convicted of a serious violent felony, or of an offense under the laws of any other state or of the United States which offense if committed in this state would be a serious violent felony, there shall be a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the person as required or assure the safety of any other person or the community. As used in this subsection, the term "serious violent felony" means a serious violent felony as defined in Code Section 17-10-6.1.

(f)(1) Except as provided in subsection (a) of this Code section or as otherwise provided in this subsection, the judge of any court of inquiry may by written order establish a schedule of bails and unless otherwise ordered by the judge of any court, a person charged with committing any offense shall be released from custody upon posting bail as fixed in the schedule.

(2) For offenses involving an act of family violence, as defined in Code Section 19-13-1, the schedule of bails provided for in paragraph (1) of this subsection shall require increased bail and shall include a listing of specific conditions which shall include, but not be limited to, having no contact of any kind or character with the victim or any

member of the victim's family or household, not physically abusing or threatening to physically abuse the victim, the immediate enrollment in and participation in domestic violence counseling, substance abuse therapy, or other therapeutic requirements.

(3) For offenses involving an act of family violence, the judge shall determine whether the schedule of bails and one or more of its specific conditions shall be used, except that any offense involving an act of family violence and serious injury to the victim shall be bailable only before a judge when the judge or the arresting officer is of the opinion that the danger of further violence to or harassment or intimidation of the victim is such as to make it desirable that the consideration of the imposition of additional conditions as authorized in this Code section should be made. Upon setting bail in any case involving family violence, the judge shall give particular consideration to the exigencies of the case at hand and shall impose any specific conditions as he or she may deem necessary. As used in this Code section, the term "serious injury" means bodily harm capable of being perceived by a person other than the victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, substantial bruises to body parts, fractured bones, or permanent disfigurements and wounds inflicted by deadly weapons or any other objects which, when used offensively against a person, are capable of causing serious bodily injury.

(4) For violations of Code Section 16-15-4, the court shall require increased bail and shall include as a condition of bail or pretrial release that the defendant shall not have contact of any kind or character with any other member or associate of a criminal street gang and, in cases involving a victim, that the defendant shall not have contact of any kind or character with any such victim or any member of any such victim's family or household.

(5) For offenses involving violations of Code Section 40-6-393, bail or other release from custody shall be set by a judge on an individual basis and not a schedule of bails pursuant to this Code section.

(g) No appeal bond shall be granted to any person who has been convicted of murder, rape, aggravated sodomy, armed robbery, home invasion in any degree, aggravated child molestation, child molestation, kidnapping, trafficking in cocaine or marijuana, aggravated stalking, or aircraft hijacking and who has been sentenced to serve a period of incarceration of five years or more. The granting of an appeal bond to a person who has been convicted of any other felony offense or of any misdemeanor offense involving an act of family violence as defined in Code Section 19-13-1, or of any offense delineated as a high and aggravated misdemeanor or of any offense set forth in Code Section 40-6-391, shall be in the discretion of the convicting court. Appeal bonds

shall terminate when the right of appeal terminates, and such bonds shall not be effective as to any petition or application for writ of certiorari unless the court in which the petition or application is filed so specifies.

(h) Except in cases in which life imprisonment or the death penalty may be imposed, a judge of the superior court by written order may delegate the authority provided for in this Code section to any judge of any court of inquiry within such superior court judge's circuit. However, such authority may not be exercised outside the county in which said judge of the court of inquiry was appointed or elected. The written order delegating such authority shall be valid for a period of one year, but may be revoked by the superior court judge issuing such order at any time prior to the end of that one-year period.

(i) As used in this Code section, the term "bail" shall include the releasing of a person on such person's own recognizance, except as limited by the provisions of Code Section 17-6-12.

(j) For all persons who have been authorized by law or the court to be released on bail, sheriffs and constables shall accept such bail; provided, however, that the sureties tendered and offered on the bond are approved by the sheriff of the county in which the offense was committed. (Orig. Code 1863, § 4625; Code 1868, § 4649; Code 1873, § 4747; Code 1882, § 4747; Penal Code 1895, § 933; Penal Code 1910, § 958; Ga. L. 1922, p. 51, § 1; Code 1933, § 27-901; Ga. L. 1973, p. 454, § 1; Ga. L. 1980, p. 1359, § 1; Ga. L. 1982, p. 910, § 1; Ga. L. 1983, p. 3, § 14; Ga. L. 1983, p. 358, § 1; Ga. L. 1983, p. 452, § 1; Ga. L. 1984, p. 22, § 17; Ga. L. 1984, p. 679, § 1; Ga. L. 1984, p. 760, § 1; Ga. L. 1985, p. 416, § 1; Ga. L. 1986, p. 166, §§ 1, 2; Ga. L. 1988, p. 358, § 1; Ga. L. 1989, p. 1714, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1991, p. 416, § 1; Ga. L. 1991, p. 1401, § 1; Ga. L. 1992, p. 1150, § 1; Ga. L. 1992, p. 2527, § 1; Ga. L. 1993, p. 91, § 17; Ga. L. 1993, p. 1534, § 2; Ga. L. 1994, p. 532, § 1; Ga. L. 1994, p. 1270, § .5; Ga. L. 1994, p. 1625, § 5; Ga. L. 1995, p. 379, §§ 1, 2; Ga. L. 1995, p. 989, §§ 1, 2; Ga. L. 1996, p. 1233, § 1; Ga. L. 1996, p. 1624, § 1; Ga. L. 1997, p. 143, § 17; Ga. L. 1998, p. 270, § 9; Ga. L. 1999, p. 391, § 3; Ga. L. 2000, p. 1171, § 1; Ga. L. 2006, p. 379, § 18/HB 1059; Ga. L. 2008, p. 817, § 1/HB 960; Ga. L. 2010, p. 226, § 1/HB 889; Ga. L. 2010, p. 230, §§ 8, 9/HB 1015; Ga. L. 2012, p. 899, § 8-8/HB 1176; Ga. L. 2013, p. 667, § 3/SB 86; Ga. L. 2014, p. 426, § 9/HB 770.)

The 2014 amendment, effective July 1, 2014, added paragraph (a)(5.1) and inserted "home invasion in any degree," near the middle of the first sentence of subsection (g).

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

Discretion of Court

Discretion as to amount of bail. Trial court did not abuse the court's discretion in denying the defendant's motion for pretrial bond after stating in the court's written order that the defendant posed a significant risk of committing further felonies pending trial of this matter and poses a significant risk to persons in the community, including the defendant personally. Prigmore v. State, 327 Ga. App. 368, 759 S.E.2d 249 (2014).

17-6-1.1. Electronic pretrial release and monitoring program for defendants; requirements; procedures; fees.

(a) In addition to other methods of posting bail or as special condition of bond, a defendant may be released from custody pending the trial of his or her case on the condition that the defendant comply with the terms and conditions of an electronic pretrial release and monitoring program which is approved pursuant to subsection (j) of this Code section. The sheriff of a county may enter into agreements with such approved providers. A bonding company, bonding agent, or probation service provider may be a provider of such services.

(b) If it appears to the court that a defendant subject to its jurisdiction is a suitable candidate for electronic pretrial release and monitoring, the court may, in its sole discretion and subject to the eligibility requirements of this Code section, authorize the defendant to be released under the provisions of an electronic pretrial release and monitoring program. A judge may only authorize electronic pretrial release and monitoring if that judge has jurisdiction to set a bond for the offense charged and the defendant is otherwise eligible for bond under subsection (e) of Code Section 17-6-1. When a court of competent jurisdiction has already set bond for a defendant indicating that the defendant is otherwise eligible for release on bail pursuant to subsection (e) of Code Section 17-6-1, in addition to accepting cash in satisfaction of the bond set by a court, the court may instruct the sheriff that the defendant is to be released to an electronic pretrial release and monitoring program.

(c) The court, in its sole discretion, may revoke at any time the eligibility of any defendant to participate in the electronic pretrial release and monitoring program in which event the defendant shall be immediately returned to custody. If the defendant's case has not been assigned to a particular division of the court, the chief judge shall have such authority.

(d) A defendant may not be released to, or remain in, an electronic pretrial release and monitoring program if such defendant has any other outstanding warrants, accusations, indictments, holds, or incarceration orders from any other court, law enforcement agency, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42 that require the posting of bond or further adjudication.

(e) A defendant released pursuant to an electronic pretrial release and monitoring program shall abide by such conditions as the court may impose relating to such program, including, but not limited to, the following:

(1) Periods of home confinement;

(2) Compliance with all requirements and conditions of the electronic pretrial release and monitoring program provider;

(3) Compliance with any court orders or special conditions of bond which may include an order directing that no contact, direct or indirect, be made with the victim or forbidding entry upon, about, or near certain premises;

(4) An order directing that the accused provide support and maintenance for the person's dependents to the best of his or her ability;

(5) Restrictions on the use of alcoholic beverages and controlled substances;

(6) Curfews;

(7) Limitations on work hours and employment;

(8) An order directing the accused to submit to test of breath, blood, or urine from time to time;

(9) Travel restrictions;

(10) An order directing that electronic pretrial release and monitoring equipment be kept in good working condition;

(11) An order directing that the person refrain from violating the criminal laws of any state, county, or municipality;

(12) An order directing timely payment of all fees connected with the electronic pretrial release and monitoring program;

(13) Payroll deductions to fund electronic pretrial release and monitoring fees;

(14) Provisions to permit reasonable medical treatment;

(15) Provisions for procuring reasonable necessities, such as grocery shopping;

(16) Provisions for attendance in educational, rehabilitative, and treatment programs; and

(17) Such other terms and conditions as the court may deem just and proper.

(f) Under no circumstances shall electronic pretrial release and monitoring equipment be introduced internally or beneath the skin of any person.

(g) In the event that a court of competent jurisdiction finds probable cause, upon oath, affirmation, or sworn affidavit, that a defendant has violated the terms or conditions of his or her electronic pretrial release and monitoring program, other than terms regarding home confinement set forth in paragraph (1) of subsection (e) of this Code section, or finds that the defendant provided false or misleading information concerning his or her qualifications to participate in the electronic pretrial release and monitoring program, including, but not limited to, name, date of birth, address, or other personal identification information, then the defendant's ongoing participation in such program shall be terminated immediately and, upon arrest of the defendant for such violation by any law enforcement officer, the defendant shall be returned to confinement at the county jail or other facility from which the defendant was released.

(h)(1) As an additional condition of electronic pretrial release and monitoring, a defendant authorized to participate in such program by the court shall pay a reasonable, nonrefundable fee for program enrollment, equipment use, and monitoring to the provider of such program. If a bonding company, bonding agent, or probation service provider is the provider, the fees earned in the capacity of being such a provider shall be in addition to the fees allowed in Code Sections 17-6-30, 42-8-34, and 42-8-102.

(2) The fees connected with the electronic pretrial release and monitoring program shall be timely paid by a defendant as a condition of his or her ongoing participation in the electronic pretrial release and monitoring program in accordance with the terms for such programs as approved by the court. Failure to make timely payments shall constitute a violation of the terms of the electronic pretrial release and monitoring program and shall result in the defendant's immediate return to custody.

(3) Defendants who have an extraordinary medical condition requiring ongoing medical treatment or indigent persons, as defined by the court, and who are selected by the court following the indigency

standards established by the court may have such electronic pretrial release and monitoring fees paid by the sheriff with the consent of the governing authority.

(i) No defendant released under an electronic pretrial release and monitoring program under this Code section shall be deemed to be an agent, employee, or involuntary servant of the county or the electronic pretrial release and monitoring provider while so released, working, or participating in training or going to and from the defendant's place of employment or training. Neither the electronic pretrial release and monitoring provider nor the sheriff shall be civilly liable for the criminal acts of a defendant released pursuant to this Code section.

(j) Any person or corporation approved by the chief judge of the court and the sheriff in their discretion who meets the following minimum requirements may be approved to provide electronic pretrial release and monitoring services:

(1) The provider shall comply with all applicable federal, state, and local laws and all rules and regulations established by the chief judge and the sheriff in counties where the provider provides electronic pretrial release and monitoring services;

(2) The provider shall provide the chief judge and the sheriff with the name of the provider, the name of an individual who shall serve as the contact person for the provider, and the telephone number of such contact person;

(3) The provider shall promptly, not later than three business days after such change, notify the chief judge and sheriff of any changes in its address, ownership, or qualifications under this Code section;

(4) The provider shall provide simultaneous access to all records regarding all monitoring information, GPS tracking, home confinement, and victim protection regarding each person placed on electronic pretrial release and monitoring; and

(5) The provider shall act as surety for the bond.

(k) The sheriff shall maintain a list of approved providers of electronic pretrial release and monitoring services. The sheriff, in his or her discretion, may temporarily or permanently remove any provider from the list of approved providers should the provider:

(1) Fail to comply with the requirements of this Code section;

(2) Fail to monitor properly any defendant that the provider was required to monitor;

(3) Charge an excessive fee for use and monitoring of electronic monitoring equipment; or

(4) Act or fail to act in such a manner that, in the discretion of the sheriff, constitutes good cause for removal. (Code 1981, § 17-6-1.1, enacted by Ga. L. 2009, p. 691, § 2/HB 306; Ga. L. 2015, p. 422, § 5-29/HB 310.)

The 2015 amendment, effective July 1, 2015, in subsection (d), substituted "if such defendant has" for "who has" near the beginning and substituted "community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42" for "or probation or parole officer" near the end; and substituted "42-8-102" for "42-8-100" near the end of paragraph (h)(1). See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides that: "This Act shall become effective July 1, 2015, and shall apply to sentences entered on or after such date."

17-6-15. Necessity for commitment where bail tendered and accepted; opportunity for bail; receipt of bail after commitment and imprisonment; imprisonment of person who offers bond for amount of bail set; effect upon common-law authority of court.

(a) After arrest, if bail is tendered and accepted, no regular commitment need be entered, but a simple memorandum of the fact of bail being taken shall be sufficient.

(b)(1) A reasonable opportunity shall be allowed the accused person to give bail; and, even after commitment and imprisonment, the committing court may order the accused person brought before it to receive bail. No person shall be imprisoned under a felony commitment when bail has been fixed, if the person tenders and offers to give bond in the amount fixed, with sureties acceptable to the sheriff of the county in which the alleged offense occurred; provided, however, the sheriff shall publish and make available written rules and regulations defining acceptable sureties and prescribing under what conditions sureties may be accepted. If the sheriff determines that a professional bonding company is an acceptable surety, the rules and regulations shall require, but shall not be limited to, the following:

(A) Complete documentation showing the composition of the company to be an individual, a trust, or a group of individuals, whether or not formed as a partnership or other legal entity, or a corporation or a combination of individuals, trusts, and corporations;

(B) Complete documentation for all employees, agents, or individuals authorized to sign or act on behalf of the bonding company;

(C) Complete documentation showing that the company holds a valid business license in the jurisdiction where bonds will be written;

(D) Fingerprints and background checks of every individual who acts as a professional bondsperson as defined in Code Section 17-6-50 for the professional bonding company seeking approval;

(E) Establishment of a cash escrow account or other form of collateral as follows:

(i) For any professional bonding company that is new to the county or that has operated continuously in the county for less than 18 months, in an amount and upon terms and conditions as determined and approved by the sheriff;

(ii) Once a professional bonding company has operated continuously for 18 months or longer in the county, then any such cash escrow account or other form of collateral shall not exceed 10 percent of the current outstanding bail bond liability of the professional bonding company; and

(iii) No professional bonding company shall purchase an insurance policy in lieu of establishing a cash escrow account or posting other collateral; provided, however, that any professional bonding company which was using an insurance policy as collateral as of December 31, 2013, may continue to do so at the discretion of the sheriff.

(F) Establishment of application, approval, and reporting procedures for the professional bonding company deemed appropriate by the sheriff which satisfy all rules and regulations required by the laws of this state and the rules and regulations established by the sheriff;

(G) Applicable fees to be paid by the applicant to cover the cost of copying the rules and regulations and processing and investigating all applications and all other costs relating thereto; or

(H) Additional criteria and requirements for approving and regulating bonding companies to be determined at the discretion of the sheriff.

(2) This Code section shall not be construed to require a sheriff to accept a professional bonding company or bondsperson as a surety.

(3) This Code section shall not be construed to prevent the posting of real property bonds and the sheriff may not prohibit the posting of property bonds. Additional requirements for the use of real property may be determined at the discretion of the sheriff. The sheriff shall not prohibit a nonresident of the county from posting a real property bond if such real property is located in the county in which it is offered as bond and if such property has sufficient unencumbered equity to satisfy the sheriff's posted rules and regulations as to acceptable sureties.

(c) This Code section shall not abrogate or repeal the common-law authority of the judge having jurisdiction. (Orig. Code 1863, § 4620; Code 1868, § 4644; Code 1873, § 4742; Code 1882, § 4742; Penal Code 1895, § 922; Penal Code 1910, § 947; Code 1933, § 27-418; Ga. L. 1977, p. 346, § 1; Ga. L. 1994, p. 532, § 2; Ga. L. 2014, p. 444, § 3-1/HB 271.)

The 2014 amendment, effective July 1, 2014, in subparagraph (b)(1)(E), substituted "collateral as follows:" for "collateral in a sum and upon terms and conditions approved by the sheriff;" and added divisions (b)(1)(E)(i) through (b)(1)(E)(iii).

ARTICLE 2

SURETIES

Part 1

General Provisions

17-6-30. Fees of sureties.

(a) Sureties on criminal bonds in any court shall not charge or receive more than 15 percent of the face amount of the bond set, which amount includes the principal and all applicable surcharges, as compensation from defendants or from anyone acting for defendants; provided, however, that a surety may charge and receive a minimum of $50.00 per bonded charge or offense as compensation, regardless of whether such compensation exceeds 15 percent of the face amount of any bond set.

(b) Any person who violates subsection (a) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1921, p. 243, §§ 1, 8; Code 1933, §§ 27-501, 27-9903; Ga. L. 1958, p. 120, § 1; Ga. L. 1982, p. 1254, § 1; Ga. L. 1999, p. 546, § 1; Ga. L. 2006, p. 430, § 1/HB 594; Ga. L. 2014, p. 444, § 3-2/HB 271.)

The 2014 amendment, effective July 1, 2014, substituted the present provisions of subsection (a) for the former provisions, which read: "Sureties on criminal bonds in any court shall not charge or receive more than 12 percent of the face amount of the bond set in the amount of $10,000.00 or less, which amount includes the principal and all applicable surcharges, and shall not charge or receive more than 15 percent of the face amount of the bond set in an amount in excess of $10,000.00, which amount includes the principal and all applicable surcharges, as compensation from defendants or from anyone acting for defendants."

PART 2

PROFESSIONAL BONDSMEN

17-6-50.1. Continuing education programs for professional bondsmen; fee; annual requirement; certificate of completion.

(a) The Georgia Association of Professional Bondsmen shall approve continuing education programs offered by professional associations, educational institutions, government agencies, and others as deemed appropriate for professional bondsmen to attend.

(b) The fee for continuing education programs for professional bondsmen shall not exceed $250.00 annually.

(c) Professional bondsmen shall be required to obtain eight hours of continuing education annually.

(d) On or before January 31 of each year, each professional bondsman shall submit a certificate of completion of eight hours of approved continuing education to the individual or department which is responsible for issuing bail bonds for each jurisdiction in which he or she is doing business. (Code 1981, § 17-6-50.1, enacted by Ga. L. 2002, p. 791, § 1; Ga. L. 2015, p. 1217, § 1/SB 195.)

The 2015 amendment, effective July 1, 2015, substituted "$250.00" for "$125.00" in subsection (b).

ARTICLE 3

PROCEEDINGS FOR FORFEITURE OF BONDS OR RECOGNIZANCES

17-6-71. Execution hearing on failure of principal to appear.

(a) The judge shall, at the end of the court day, upon the failure of the principal to appear, forfeit the bond, issue a bench warrant for the principal's arrest, and order an execution hearing not sooner than 120 days but not later than 150 days after such failure to appear. Notice of the execution hearing shall be served by the clerk of the court in which the bond forfeiture occurred within ten days of such failure to appear by certified mail or by electronic means as provided in Code Section 17-6-50 to the surety at the address listed on the bond or by personal service to the surety within ten days of such failure to appear at its home office or to its designated registered agent. Service shall be considered complete upon the mailing of such certified notice. Such ten-day notice shall be adhered to strictly. If notice of the execution

hearing is not served as specified in this subsection, the surety shall be relieved of liability on the appearance bond.

(b) If at the execution hearing it is determined that judgment should be entered, the judge shall so order and a writ of fieri facias shall be filed in the office of the clerk of the court where such judgment is entered. The provisions of this subsection shall apply to all bail bonds, whether returnable to superior court, state court, probate court, magistrate court, or municipal court. (Laws 1831, Cobb's 1851 Digest, p. 862; Code 1863, § 4585; Code 1868, § 4606; Code 1873, § 4703; Code 1882, § 4703; Penal Code 1895, § 937; Penal Code 1910, § 962; Code 1933, § 27-906; Ga. L. 1943, p. 282, § 2; Ga. L. 1953, Jan.-Feb. Sess., p. 452, § 1; Code 1981, § 17-6-71; Ga. L. 1982, p. 1224, § 2; Ga. L. 1983, p. 1203, § 2; Ga. L. 1986, p. 1588, § 3; Ga. L. 1987, p. 1342, § 3; Ga. L. 1989, p. 556, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1990, p. 2336, § 1; Ga. L. 1992, p. 2933, § 3; Ga. L. 2000, p. 1589, § 3; Ga. L. 2009, p. 688, § 2/HB 147; Ga. L. 2015, p. 1217, § 2/SB 195.)

The 2015 amendment, effective July 1, 2015, inserted ", issue a bench warrant for the principal's arrest," in the first sentence in subsection (a).

17-6-72. Conditions not warranting forfeiture of bond for failure to appear; remission of forfeiture.

(a) No judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the satisfaction of the court by the written statement of a licensed physician that the principal on the bond was prevented from attending court due to a mental or physical disability or the principal on the bond was receiving inpatient treatment as involuntary treatment, as such terms are defined in Code Section 37-3-1.

(b) No judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the satisfaction of the court that the principal on the bond was prevented from attending because he or she was detained by reason of arrest, sentence, or confinement in a penal institution or jail in the State of Georgia, or so detained in another jurisdiction, or because he or she was involuntarily confined or detained pursuant to court order in a mental institution in the State of Georgia or in another jurisdiction. An official written notice of the holding institution in which the principal is being detained or confined shall be considered proof of the principal's detention or confinement. Such notice may be sent from the holding institution by mail or e-mail or delivered by hand or by facsimile machine. Upon the presentation of such written notice to the clerk of the proper court, the prosecuting attorney, and the sheriff or other law enforcement officer having jurisdiction over the case, along with a letter of intent to pay all costs of returning the principal to the jurisdiction of the court, such notice and letter shall serve as the surety's request for a detainer or hold to be placed on the principal.

Should there be a failure to place a detainer or hold within ten business days of the surety's service of a detainer or hold request, and after such presentation of such notice and letter of intent to pay costs, the surety shall then be relieved of the liability for the appearance bond without further order of the court.

(c) No judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the satisfaction of the court that prior to the entry of the judgment on the forfeiture the principal on the bond is in the custody of the sheriff or other responsible law enforcement agency. An official written notice of the holding institution in which the principal is being detained or confined shall be considered proof of the principal's detention or confinement. Such notice may be sent from the holding institution by mail or e-mail or delivered by hand or by facsimile machine. Upon presentation of such written notice to the clerk of the proper court, the prosecuting attorney, and the sheriff or other law enforcement officer having jurisdiction over the case along with a letter of intent to pay all costs of returning the principal to the jurisdiction of the court, such notice and letter shall serve as the surety's request for a detainer or hold to be placed against the principal. Should there be a failure to place a detainer or hold within ten business days of the surety's service of a detainer or hold request, and after presentation of such notice and letter of intent to pay costs, the surety shall then be relieved of the liability for the appearance bond without further order of the court.

(c.1) No judgment shall be rendered on a forfeiture of any appearance bond if it is shown to the satisfaction of the court that the principal on the bond was prevented from attending because he or she was deported or removed from the United States by federal authorities. Official documentation from a federal official or agency shall be considered proof of the principal's deportation or removal. Such documentation may be delivered by mail or e-mail or delivered by hand or by facsimile machine.

(d) In cases in which subsection (e) of this Code section is not applicable, on application filed within 120 days from the payment of judgment, the court shall order remission under the following conditions:

(1) Provided the bond amount has been paid within 120 days after judgment and the delay has not prevented prosecution of the principal and upon application to the court with prior notice to the prosecuting attorney of such application, said court shall direct remission of 95 percent of the bond amount remitted to the surety if the principal is produced or otherwise appears before the court that has jurisdiction of the bond within such 120 day period. Should the surety, within two years of the principal's failure to appear, locate the

principal in the custody of the sheriff in the jurisdiction where the bond was made or in another jurisdiction causing the return of the principal to the jurisdiction where the bond was made, apprehend, surrender, or produce the principal, if the apprehension or surrender of the principal is substantially procured or caused by the surety, or if the location of the principal by the surety causes the adjudication of the principal in the jurisdiction in which the bond was made, the surety shall be entitled to a refund of 50 percent of the bond amount. The application for 50 percent remission shall be filed no later than 30 days following the expiration of the two-year period following the date of judgment; or

(2) Remission shall be granted upon condition of the payment of court costs and of the expenses of returning the principal to the jurisdiction by the surety.

(e)(1) If, within 120 days from payment of the judgment, the surety surrenders the principal to the sheriff or responsible law enforcement officer, or said surrender has been denied by the sheriff or responsible law enforcement officer, or the surety locates the principal in custody in another jurisdiction, the surety shall only be required to pay costs and 5 percent of the face amount of the bond, which amount includes all surcharges. If it is shown to the satisfaction of the court, by the presentation of competent evidence from the sheriff or the holding institution, that said surrender has been made or denied or that the principal is in custody in another jurisdiction or that said surrender has been made and that 5 percent of the face amount of the bond and all costs have been tendered to the sheriff, the court shall direct that the judgment be marked satisfied and that the writ of fieri facias be canceled.

(2)(A) The court shall direct that the judgment be marked satisfied and that the writ of fieri facias be canceled, if within 120 days from payment of the judgment, the surety:

(i) Tenders an amount equal to 5 percent of the face amount of the bond and all costs to the sheriff; and

(ii) Provides, in writing, the court and the prosecuting attorney for the court that has jurisdiction of the bond with competent evidence giving probable cause to believe that the principal is located in another jurisdiction within the United States and states that it will provide for the reasonable remuneration for the rendition of the principal, as estimated by the sheriff; and

(B) The prosecuting attorney for the court that has jurisdiction of the bond:

(i) Declines, in writing, to authorize or facilitate extradition; or

(ii) Within ten business days of the notice provided pursuant to division (2)(A)(ii) of this subsection, fails to enter the appropriate extradition approval code into the computerized files maintained by the Federal Bureau of Investigation National Crime Information Center thereby indicating an unwillingness to extradite the principal. (Ga. L. 1965, p. 266, §§ 1-3; Code 1981, § 17-6-72; Ga. L. 1982, p. 1224, § 2; Ga. L. 1982, p. 1658, § 2; Ga. L. 1983, p. 3, § 14; Ga. L. 1983, p. 1203, § 3; Ga. L. 1985, p. 982, § 1; Ga. L. 1986, p. 1588, § 4; Ga. L. 1987, p. 1342, § 4; Ga. L. 1989, p. 556, § 2; Ga. L. 1990, p. 2336, § 2; Ga. L. 1992, p. 2933, § 4; Ga. L. 1996, p. 1233, § 3; Ga. L. 2009, p. 688, § 2A/HB 147; Ga. L. 2013, p. 1106, § 1/SB 225; Ga. L. 2015, p. 1217, § 3/SB 195.)

The 2015 amendment, effective July 1, 2015, near the middle of subsections (b) and (c), substituted "confinement. Such notice" for "confinement and such notice" and inserted "e-mail or"; and, in subsection (c.1), inserted "or removed from the United States" in the first sentence, and in the second sentence, substituted "Official documentation" for "An official written notice of such deportation" at the beginning, inserted "or agency" near the middle, and added "or removal. Such documentation may be delivered by mail or e-mail or delivered by hand or by facsimile machine" at the end.

CHAPTER 7

PRETRIAL PROCEEDINGS

ARTICLE 3

INDICTMENTS

17-7-50.1. Time for presentment of child's case to a grand jury; exception.

Law reviews. — For annual survey on criminal law, see 65 Mercer L. Rev. 79 (2013).

JUDICIAL DECISIONS

Superior court had jurisdiction. — Given that the defendant failed to perfect the record by including in the record on appeal the transfer order which was the subject of the complaint, the appellate court assumed that the trial court's finding that a valid transfer order had been filed into the record before the superior court considered the state's motion for extension of time was correct and, thus, the trial court had jurisdiction to grant the state an extension of time to indict the defendant and, further, to accept the defendant's guilty plea. Walker v. State, 330 Ga. App. 872, 769 S.E.2d 602 (2015).

Effect of release on bail. — Man-

dated 180-day time limit during which the state must present the case to the grand jury does not cease to run if the juvenile is released on bail. Edwards v. State, 323 Ga. App. 864, 748 S.E.2d 501 (2013).

17-7-53.1. Quashing of second grand jury indictment or presentment bars further prosecution.

JUDICIAL DECISIONS

Nolle prossed entries.

Trial court did not abuse the court's discretion by granting the nolle prosequi as to a first indictment nor did the court err in denying the defendant's plea of former jeopardy and motion to dismiss a third indictment because under O.C.G.A. § 17-8-3, the state did not need defendant's consent to obtain an order of nolle prosequi before the case was submitted to a jury and the court had the discretion to order the nolle prosequi, instead of quashing the indictment to avoid the application of O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Trial court has discretion to order the entry of a nolle prosequi, instead of quashing the indictment, to avoid the application of O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Entries of nolle prosequi do not trigger the bar to prosecution in O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Nothing in O.C.G.A. § 17-7-53.1 evidences an intent by the Georgia General Assembly to include actions initiated by the state in the enumerated matters giving rise to application of the statutory bar to future prosecution. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

17-7-54. Form of indictment by grand jury.

JUDICIAL DECISIONS

Analysis

General Consideration
Particular Offenses

General Consideration

Failure to narrow ranges of dates. — Trial court did not err by denying the defendant's special demurrer to Counts 1 and 2 of the indictment charging incest based on the state failing to have narrowed the ranges of dates because the evidence showed that the defendant had engaged in at least 50 individual acts of incest with an older daughter throughout the two-year time period alleged in the indictment, not just during the months the defendant identified in the defendant's brief. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Particular Offenses

Demurrer to indictment for aggravated assault and felony murder based on aggravated assault. — There was no basis to grant the defendant a special demurrer on the counts for aggravated assault and felony murder based on assault as the indictment informed the defendant that the state intended to prove that on a day when the defendant admitted the victim was in the defendant's custody, the defendant used an object that was likely to result in serious bodily injury to fatally injure the victim by causing damage to the victim's brain, which was sufficient notice for the defendant to prepare a defense. State v. Wyatt, 295 Ga. 257, 759 S.E.2d 500 (2014).

Indictment for insurance fraud. — There was not a fatal variance in the evidence because the evidence adduced at trial was sufficient to sustain the defendant's conviction for insurance fraud and

was consistent with the allegations in the indictment as the evidence showed that the defendant, an attorney, assisted the client in making an affirmative fraudulent representation when the client signed the sworn proof of loss statement claiming that the client suffered a loss, when in fact the client had not. Sallee v. State, 329 Ga. App. 612, 765 S.E.2d 758 (2014).

ARTICLE 4

ACCUSATIONS

17-7-70. Trial upon accusations in felony cases; trial upon accusations of felony and misdemeanor cases in which guilty plea entered and indictment waived.

JUDICIAL DECISIONS

Waiver and consent in writing is jurisdictional requirement.

Defendant's conviction for aggravated assault was void for lack of jurisdiction and had to be reversed because the evidence showed that the defendant verbally waived the defendant's right to a grand jury indictment at the start of trial and a written waiver was required by O.C.G.A. § 17-7-70(a). Martinez v. State, 322 Ga. App. 63, 743 S.E.2d 621 (2013).

17-7-71. Trials of misdemeanors; trial of misdemeanor motor vehicle violations; form and contents of accusations; amendment of accusation; service of amendment upon defendant; continuances.

JUDICIAL DECISIONS

Indictment for misdemeanor battery sufficient.

Accusation for battery, family violence, and criminal trespass that alleged that the defendant injured the victim by striking the victim, causing a visibly bloody lip, and that the defendant knocked a hole in the victim's closet door, was sufficient under O.C.G.A. § 17-7-71(c). There was no requirement that the accusation state the instrumentality used by the defendant because the instrumentality was not an element of any of the charged crimes. State v. Leatherwood, 326 Ga. App. 730, 757 S.E.2d 434 (2014).

Cited in Martinez v. State, 322 Ga. App. 63, 743 S.E.2d 621 (2013).

ARTICLE 5

ARRAIGNMENT AND PLEAS GENERALLY

17-7-93. Reading of indictment or accusation; answer of accused to charge; recordation of "guilty" plea and pronouncement of judgment; withdrawn guilty pleas; pleas by immigrants.

JUDICIAL DECISIONS

Analysis

Withdrawal of Pleas

Withdrawal of Pleas

Absolute right to withdrawal lost once written sentence entered. — When the trial court simply neglects to pronounce orally the sentence at the plea hearing but does enter a written judgment of sentence, a defendant loses the defendant's absolute right to withdraw the defendant's guilty plea at the time the written sentence is filed and any motion to withdraw the plea must be made in the same term of court in which the sentence was filed. Barton v. State, 769 S.E.2d 96, No. A14A2006, 2015 Ga. App. LEXIS 21 (2015).

17-7-95. Plea of nolo contendere in noncapital felony cases; imposition of sentence; use of plea in other proceedings; use of plea to effect civil disqualifications; imposition of sentence upon plea deemed jeopardy.

Law reviews. — For article, "The Misunderstood Alford Plea: A Primer," see 19 Ga. St. B.J. 8 (Aug. 2013).

ARTICLE 6

DEMURRERS, MOTIONS, AND SPECIAL PLEAS AND EXCEPTIONS

Part 1

General Provisions

17-7-110. Time for filing pretrial motions.

JUDICIAL DECISIONS

Motion untimely and no extension sought. — Trial court did not err in refusing to consider defendant's motion to suppress because the motion was untimely, the defendant failed to hire private counsel as was indicated and, even after court-appointed counsel was provided, the defendant failed to seek leave to file a motion for an extension after the 10-day filing period. Taylor v. State, 326 Ga. App. 27, 755 S.E.2d 839 (2014).

Untimely pretrial motions properly

denied. — Trial court did not abuse the court's discretion by denying the defendant's motion to file untimely pre-trial motions because it was within the court's discretion to refuse to consider the motion since the defendant failed to use reasonable diligence to obtain counsel prior to the arraignment. Preston v. State, 327 Ga. App. 556, 760 S.E.2d 176 (2014).

Special demurrers to indictment. Because the defendant did not file a special demurrer, the defendant waived the right to a special indictment. Bryant v. State, 320 Ga. App. 838, 740 S.E.2d 772 (2013).

Failure to file special demurrer to indictment waived later challenge. Trial court did not err by finding that the defendant waived the defendant's right to challenge the indictment charging the defendant with reckless driving because the defendant failed to timely file a written special demurrer. Lauderback v. State, 320 Ga. App. 649, 740 S.E.2d 377 (2013).

Seven year delay in challenging indictment based on grand jury composition. — Appellants waived the appellants' challenge to the indictment based on the composition of the grand jury because an elected official served on the grand jury that returned the indictment since the appellants failed to challenge the indictment on the ground that the grand jury was illegally constituted until the appellants filed amended motions for new trial more than seven years after the statutory deadline for such a claim. Bighams v. State, 296 Ga. 267, 765 S.E.2d 917 (2014).

Counsel's failure to file timely demurrer not ineffective assistance because demurrer was meritless. — Criminal attempt to possess cocaine was properly used as the underlying felony for a felony murder conviction because the defendant's plan to rob a cocaine dealer was the proximate cause of the victim's death, and the plan to rob an individual dealing in illegal drugs carried with it a foreseeable risk of danger and death; therefore, counsel was not ineffective in failing to file a demurrer to the indictment within the time provided in O.C.G.A. § 17-7-110. Funck v. State, 296 Ga. 371, 768 S.E.2d 468 (2015).

Cited in Brown v. State, 322 Ga. App. 446, 745 S.E.2d 699 (2013).

17-7-112. Plea of misnomer.

JUDICIAL DECISIONS

Misnomer not sufficiently shown. Defendant Latoya Thornton's claim of misnomer and motion to quash were rejected because, contrary to the defendant's claims, the defendant had previously been arrested and booked into jail under the name Latoia Jordan. The accusation naming the defendant as Latoia Jordan therefore was sufficient because Jordan was another name by which the defendant was known. Thornton v. State, 325 Ga. App. 475, 753 S.E.2d 139 (2013).

PART 2

INSANITY AND MENTAL INCOMPETENCY

17-7-131. Proceedings upon plea of insanity or mental incompetency at time of crime.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
JURY CHARGE

General Consideration

Death penalty.

In a 28 U.S.C. § 2254 case in which a death penalty inmate moved for reconsideration of a district court's finding that the inmate was not mentally retarded under Georgia law, the district court remained unconvinced that it should apply the Flynn Effect to reduce the inmate's IQ scores, and even if the full four point reduction requested was applied, the inmate had credible IQ scores of 73 and 75, which were still above the score of 70 that was generally considered to demonstrate significantly subaverage intellectual functioning under Georgia law. Ledford v. Head, 2014 U.S. Dist. LEXIS 24835 (N.D. Ga. Feb. 26, 2014).

In a 28 U.S.C. § 2254 case in which a death penalty inmate moved for reconsideration of a district court's finding that the inmate was not mentally retarded under Georgia law, the case law cited by the inmate did not alter the court's perception of the evidence presented in the case, nor the court's ultimate conclusion that the inmate failed to meet the inmate's burden of proving that the inmate had adaptive deficits in two or more of the relevant areas. Ledford v. Head, 2014 U.S. Dist. LEXIS 24835 (N.D. Ga. Feb. 26, 2014).

Defendant's motion to withdraw a guilty plea, etc.

Appellate court was not persuaded that the defendant was entitled to withdraw a plea of guilty but mentally ill due to the trial court's failure to follow the procedures in O.C.G.A. § 17-7-131(b)(2), because the defendant failed to prove that withdrawal of the plea was necessary to correct a manifest injustice, having presented no evidence the defendant was harmed by entry of the plea. Poole v. State, 326 Ga. App. 243, 756 S.E.2d 322 (2014).

Release from not guilty by reason of insanity verdict. — Trial court erred by not releasing the defendant from the not guilty by reason of insanity verdict because the defendant rebutted the presumption of insanity and the need for continued involuntary outpatient commitment; the treating psychiatrist testified that the defendant had good insight into the defendant's condition, was coping well, was compliant, independently cared for self, and could be responsible for complying with treatment without the aid of an involuntary order. Coogler v. State, 324 Ga. App. 796, 751 S.E.2d 584 (2013).

Court did not need to inquire sua sponte into defendant's competency.

Trial court did not err by failing to sua sponte order that the defendant submit to a mental health evaluation to determine the defendant's sanity, or by failing to instruct the jury that it was entitled to reach a verdict of guilty but mentally ill as the defendant made no request, motion, or other affirmative attempt to demonstrate to the trial court that the defendant had an insanity defense. Perkins v. State, 328 Ga. App. 508, 759 S.E.2d 626 (2014).

Jury Charge

If there is no evidence to support a charge on insanity, etc.

Defendant's ineffective assistance of counsel claim failed based on the defense attorney not requesting a jury charge of not guilty by reason of insanity because the attorney testified at the hearing on the motion for a new trial that the attorney considered it but found no evidence to support such a defense theory, thus, it was reasonable trial strategy. Hosley v. State, 322 Ga. App. 425, 746 S.E.2d 133 (2013).

Counsel not ineffective for not raising issue of defendant's mental health. — Because the defendant produced no expert testimony at the motion for new trial showing that a psychological evaluation would have aided an insanity defense, the defendant's claim that counsel was ineffective for failing to investigate and raise the issue of the defendant's mental health rested on speculation and failed for lack of demonstrated prejudice. Perkins v. State, 328 Ga. App. 508, 759 S.E.2d 626 (2014).

ARTICLE 7

DEMAND FOR TRIAL; ANNOUNCEMENT OF READINESS FOR TRIAL

17-7-170. Demand for speedy trial; service; discharge and acquittal for lack of prosecution; expiration; reversal on direct appeal; mistrial and retrial; special pleas of incompetency.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Neal v. Hibbard, 770 S.E.2d 600, No. S14A1673, 2015 Ga. LEXIS 183 (2015).

Timing

Defendant's demand for a speedy trial was timely filed. — Trial counsel was not ineffective because the second defendant's speedy trial demand was filed in a timely fashion. Maldonado v. State, 325 Ga. App. 41, 752 S.E.2d 112 (2013).

Qualified Jury

Consideration of number of available jurors. — Court of appeals erred in holding that the term in which the defendant filed a speedy trial demand did not count for purposes of determining entitlement to discharge and acquittal. The court of appeals erred in finding there were only five jurors available as the remaining 32 who appeared were either serving on other trials or had been committed for other trials; O.C.G.A. § 17-7-170 did not require the court to examine how many jurors were serving on other trials or committed to other trials. Williamson v. State, 295 Ga. 185, 758 S.E.2d 790 (2014).

17-7-171. Time for demand for speedy trial in capital cases; discharge and acquittal where no trial held before end of two court terms of demand; counting of terms in cases in which death penalty is sought; special pleas of incompetency.

JUDICIAL DECISIONS

ANALYSIS

Appeals

Right to appeal.

Although the trial court orally indicated that the court was signing an order allowing the defendant's counsel to withdraw, no such order was in the record, and counsel's withdrawal notice had no effect on the defendant's representation; therefore, a pro se notice of appeal filed by the

Appeals (Cont'd)

defendant following the denial of the defendant's speedy trial motion was ineffective because the defendant was represented at the time of the notice. Tolbert v. Toole, 296 Ga. 357, 767 S.E.2d 24 (2014).

ARTICLE 8

PROCEDURE FOR SECURING ATTENDANCE OF WITNESSES AT GRAND JURY OR TRIAL PROCEEDINGS

17-7-191. Subpoena process for witnesses of defendant; when subpoenas may be extended to witnesses outside of county.

JUDICIAL DECISIONS

Full faith and credit given to out-of-state order. — Trial court did not err by requiring the defendant to proceed to trial without the source code and other requested information because the court had granted a certificate pursuant to O.C.G.A. § 24-13-94 to permit the defense an opportunity to obtain the information from the manufacturer located in Kentucky, set the case with enough time to do so, and, after the Kentucky court issued an order denying the request, which order was entitled to full faith and credit, required the defendant to proceed to trial. Phillips v. State, 324 Ga. App. 728, 751 S.E.2d 526 (2013).

CHAPTER 8

TRIAL

Article 1

General Provisions

Article 3

Conduct of Proceedings

ARTICLE 1

GENERAL PROVISIONS

17-8-1. Cases to be called in order in which they stand on docket; exceptions; preferred scheduling when alleged victim is disabled adult or elder person.

(a) The cases on the criminal docket shall be called in the order in which they stand on the docket unless the accused is in jail or, otherwise, in the sound discretion of the court.

(b)(1) As used in this Code section, the terms "disabled adult" and "elder person" shall have the same meaning as set forth in Code Section 16-5-100.

(2) When the alleged victim is a disabled adult or elder person, the prosecuting attorney shall notify the accused if it intends to seek preferred scheduling. The notice shall be in writing and shall:

(A) Allege the specific factor or factors that will inhibit a disabled adult from attending or participating in court proceedings if he or she is a disabled adult; or

(B) State the age of the alleged victim if he or she is an elder person.

(3) When notice has been given pursuant to paragraph (2) of this subsection, the court shall set a date for a hearing on the issue within 14 days after the filing of such notice. The court shall consider the matter and if the court determines that preferred scheduling is necessary, the trial shall not be:

(A) Subject to subsection (a) of this Code section; and

(B) Earlier than 30 days from the date of the hearing. (Ga. L. 1862-63, p. 139, § 1; Code 1863, § 4592; Code 1868, § 4613; Code 1873, § 4710; Code 1882, § 4710; Penal Code 1895, § 942; Penal Code 1910, § 967; Code 1933, § 27-1301; Ga. L. 2015, p. 598, § 1-5/HB 72.)

The 2015 amendment, effective July 1, 2015, designated the existing provisions as subsection (a), and, in subsection (a), substituted "accused" for "defendant"; and added subsection (b).

17-8-3. Entry of nolle prosequi.

JUDICIAL DECISIONS

Trial court has discretion to order the entry of a nolle prosequi, instead of quashing the indictment, to avoid the application of O.C.G.A. § 17-7-53.1. Blanton

v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Reindictment after nolle prosequi.

Trial court did not abuse the court's discretion by granting the nolle prosequi as to a first indictment nor did the court err in denying the defendant's plea of former jeopardy and motion to dismiss a third indictment because under O.C.G.A. § 17-8-3 the state did not need the defendant's consent to obtain an order of nolle prosequi before the case was submitted to a jury and the state had the discretion to order the nolle prosequi, instead of quashing the indictment to avoid the application of O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Entries of nolle prosequi do not trigger the bar to prosecution in O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Under O.C.G.A. § 17-8-3, the state does not need a defendant's consent to obtain an order of nolle prosequi before the case has been submitted to a jury and that the entry of such orders renders the motions to quash moot. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Cited in Brown v. State, 322 Ga. App. 446, 745 S.E.2d 699 (2013).

17-8-4. Procedure for trial of jointly indicted defendants; right of defendants to testify for or against one another; order of separate trials; acquittal or conviction where offense requires joint action or concurrence; number of strikes allowed defendants.

JUDICIAL DECISIONS

Analysis

General Consideration

Failure to instruct jury as to guilt or innocence of one who is being separately tried.

Although the trial court did not give the defendant's own particularized instruction regarding the possible motives of testifying witnesses, the court gave the pattern jury charge on testifying witnesses and, thus, the jury was properly instructed that the jurors were to decide the believability of the witnesses. Kitchens v. State, 296 Ga. 384, 768 S.E.2d 476 (2015).

Separate Trials

Denial of severance proper.

Denial of the second defendant's request to sever was not erroneous because the trial court gave appropriate limiting instructions cautioning the jury that the similar transaction action could only be considered against the first defendant. Billings v. State, 293 Ga. 99, 745 S.E.2d 583 (2013).

Trial court did not err in denying the first defendant's motion to sever because the evidence of the DVD player pawned by the second defendant did not prejudice the defense of the first defendant given the extensive nature of the evidence tying the first defendant to the victim's murder including all of the items belonging to the victim found in the first defendant's home. Perera v. State, 295 Ga. 880, 763 S.E.2d 687 (2014).

Trial court did not err in denying the second defendant's motion to sever as the defense of the second defendant was not harmed by the introduction of jailhouse letters written to the second defendant by the first defendant given the voluminous evidence linking the second defendant directly to the victim's murder; and because those letters would have been admissible against both of the defendants, even if the defendants had been tried separately as

both of the defendants were part of a criminal conspiracy and the criminal project was still ongoing at the time the letters were written. Perera v. State, 295 Ga. 880, 763 S.E.2d 687 (2014).

Prejudice

Prejudice not shown.

Defendant was not prejudiced by a joint trial based on the defendant and a codefendant's similar appearance because several of the witnesses had known the defendant and the codefendants for years, others were able to identify the defendant by the defendant's distinctive clothing, and any confusion at the joint trial was cleared up by the one witness who confused the defendant and the codefendant and did not amount to a denial of due process; the defendant and the codefendants urged defenses that were, for the most part, consistent; and, even to the extent that the defendant and the codefendants urged antagonistic defenses, the defendant failed to show that the joint trial denied the defendant due process. Thomas v. State, 293 Ga. 829, 750 S.E.2d 297 (2013).

Application

Motion to sever in murder cases.

Trial court's refusal to sever two murder counts because the defendant was not involved in those murders was not an abuse of discretion because evidence regarding the subject murders was relevant to the gang's existence as a "criminal street gang" and to certain codefendants' participation in criminal street gang activity, and the jury was instructed on the purpose for which the evidence was offered. Morris v. State, 294 Ga. 45, 751 S.E.2d 74 (2013).

Defendant completely failed to show any specific prejudice such that the joint trial denied the defendant due process because there was little likelihood of actual juror confusion in the case since only four defendants were tried and the law and evidence that applied to each of the defendants were substantially the same and the trial court gave appropriate limiting instructions, indicating that the similar transaction evidence could be considered only as to each co-defendant against whom that evidence was admitted. Nwakanma v. State, 296 Ga. 493, 768 S.E.2d 503 (2015).

Severance argument waived.

Because the defendant made no motion to sever, made no motion to exclude the similar transaction evidence at trial or during the pretrial hearing on the issue, did not join a co-defendant's motions to sever the trial or exclude the evidence, only raised the issues in a motion for new trial, and did not raise the issues at trial, the defendant waived the right to argue the issues regarding severance and the introduction of similar transaction evidence on appeal. Davis v. State, 331 Ga. App. 585, 771 S.E.2d 232 (2015).

No abuse for failure to sever.

Trial court did not err in denying the defendant's motion to sever the defendant's trial from that of the codefendant as the defenses of the defendant and the codefendant were not antagonistic and the jury was instructed that the defendants were on trial only for the offenses charged in the indictment and not for any other acts or occurrences. Harrell v. State, 322 Ga. App. 115, 744 S.E.2d 105 (2013).

Trial court did not err in failing to sever the defendant's trial from that of the co-defendant as the evidence showed they acted together, the law applicable to each was the same, and the defendant failed to point to evidence that would not have been admitted in a separate trial. Coe v. State, 293 Ga. 233, 748 S.E.2d 824 (2013).

Trial court did not err in denying a motion to sever, because the law applicable to each defendant was substantially the same, the evidence showed the defendants acted together, and there was no showing of prejudice from the presentation of antagonistic defenses. Flournoy v. State, 294 Ga. 741, 755 S.E.2d 777 (2014).

Defendant failed to show that the trial court abused the court's discretion in failing to sever the defendant's trial from the co-defendant's because the defendant failed to show that the evidence may have been confusing to the jurors, especially since there were only two co-defendants involved in the case and the evidence showed that the defendant acted in concert with the co-defendant by driving the

Application (Cont'd)

getaway vehicle. Broyard v. State, 325 Ga. App. 794, 755 S.E.2d 36 (2014).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever because there was little likelihood of jury confusion as there were only two defendants at trial and no difference in the law applied to the two defendants; the jury addressed the defendants' indictments separately and returned a separate verdict for each defendant; and antagonistic defenses alone were not sufficient to mandate severance. Taylor v. State, 331 Ga. App. 577, 771 S.E.2d 224 (2015).

Trial court did not err in denying the first defendant's motion to sever as there was little likelihood of jury confusion given that there were only two defendants and no difference in the law applied to the defendants and evidence that the second defendant was a gang member would have been admissible against the first defendant in a separate trial. Zamudio v. State, No. A14A2023, 2015 Ga. App. LEXIS 176 (Mar. 20, 2015).

17-8-5. Recordation of testimony in felony cases; entering testimony on minutes of court where guilty verdict found; preparation of transcript where death sentence imposed; preparation of transcript where mistrial results in felony case.

JUDICIAL DECISIONS

Counsel not ineffective for failing to transcribe opening and closing statements and voir dire. — Trial counsel was not ineffective for failing to have the opening and closing statements and voir dire transcribed because the arguments of counsel at trial are not required to be transcribed; and although objections and rulings thereon made during jury selection are required to be reported and made part of the trial record, there is no requirement that the entire jury selection be reported and made part of the record in a nondeath penalty felony case. Curtis v. State, 330 Ga. App. 839, 769 S.E.2d 580 (2015).

ARTICLE 2

CONTINUANCES

17-8-22. Consideration of motion for continuance by court generally; allowance of counter-showing to motion.

JUDICIAL DECISIONS

ANALYSIS

PRACTICE AND PROCEDURE

Practice and Procedure

Motion for continuance denied.

Trial court did not abuse the court's discretion by denying the defendant's motion for a continuance because the defendant failed to present any evidence or testimony at the motion for new trial hearing implicating a different perpetrator nor specifically identified what evidence or witnesses the defendant would have put forth in defense if counsel had been given more time to prepare as speculation and conjecture were not enough. Calhoun v. State, 327 Ga. App. 683, 761 S.E.2d 91 (2014).

Defendant's request for a continuance

on the day of trial after the defendant fired a fourth attorney was properly denied because the defendant was offered time to review the victim's medical records, which the discharged attorney had handed to the defendant at the beginning of the proceeding, and the defendant did not explain how more time would have helped; although the defendant argued for a motion for continuance to obtain witnesses, the defendant did not make the required proffer of what the witnesses would testify about or who the witnesses were; and, although the defendant argued for a continuance based on the defendant's mental illness, the defendant pointed to no record evidence supporting the assertion that the defendant was mentally ill. Lewis v. State, 330 Ga. App. 650, 768 S.E.2d 821 (2015).

17-8-25. Grounds for granting of continuances — Absence of witness generally.

JUDICIAL DECISIONS

ANALYSIS

PRACTICE AND PROCEDURE

Practice and Procedure

Absence of witness for state.

Trial court did not err by excusing the jury after an ex parte conference with the state about a problem with the state's witnesses, because the jury had not been sworn, so no jeopardy attached, the state had shown that absent witnesses were material, the trial resumed one month later, and the defendant was not surprised by the witnesses at trial. Hoke v. State, 326 Ga. App. 71, 755 S.E.2d 876 (2014).

Grounds for continuance not met.

Defendant did not meet the requirements for a continuance under O.C.G.A. § 17-8-25 due to the absence of the defendant's mother because the defendant did not subpoena the defendant's mother. Daniels v. State, 321 Ga. App. 748, 743 S.E.2d 440 (2013).

Trial court did not err in denying the defendant's request for a continuance based on a witness's absence as there was no evidence a subpoena for the witness existed, counsel conceded that counsel released the witness from the subpoena after the first day of trial, the defendant failed to establish the witness's place of residence or availability by the next term, and the defendant failed to provide the trial court with the facts the defendant expected the witness to prove. Janasik v. State, 323 Ga. App. 545, 746 S.E.2d 208 (2013).

ARTICLE 3

CONDUCT OF PROCEEDINGS

17-8-54. Persons in courtroom when person under age of 16 testifies concerning sexual offense.

JUDICIAL DECISIONS

Allowing child victim's psychologist to remain in court not error.

Trial court did not err in allowing a victim's advocate to accompany the first victim to the witness stand and sit by the first victim in front of the jury while the first victim testified because the trial court carefully observed the advocate's presence and demeanor during the first victim's testimony and saw no inappropri-

ate or prejudicial conduct or behavior. Ford v. State, 322 Ga. App. 31, 743 S.E.2d 442 (2013).

Failure to object.

Defendant waived any challenge to the trial court's exclusion of the defendant's family during the victim's testimony by failing to object. Waiver aside, the challenge lacked merit, as the defendant could not show the alleged error harmed the defendant. Davis v. State, 323 Ga. App. 266, 746 S.E.2d 890 (2013).

Closed proceedings proper.

Trial court properly cleared the courtroom while the two minor victims testified at the defendant's trial for child molestation as O.C.G.A. § 17-8-54 authorized the trial court to clear the courtroom and, to the extent the trial court improperly required persons excepted from § 17-8-54 to leave as well, the defendant waived appellate review by not objecting. Tolbert v. State, 321 Ga. App. 637, 742 S.E.2d 152 (2013).

17-8-55. Testimony of child less than seventeen years old outside physical presence of accused.

(a) As used in this Code section, the term "child" means an individual who is under 17 years of age.

(b) This Code section shall apply to all proceedings when a child is a witness to or an alleged victim of a violation of Code Section 16-5-1, 16-5-20, 16-5-23, 16-5-23.1, 16-5-40, 16-5-70, 16-5-90, 16-5-95, 16-6-1, 16-6-2, 16-6-3, 16-6-4, 16-6-5, 16-6-5.1, 16-6-11, 16-6-14, 16-6-22, 16-6-22.1, 16-6-22.2, 16-8-41, or 16-15-4.

(c) The court, upon the motion of the prosecuting attorney or the parent, legal guardian, or custodian of a child, or on its own motion, shall hold an evidentiary hearing to determine whether a child shall testify outside the physical presence of the accused. Such motion shall be filed, or requested by the court, at least ten days prior to trial unless the court shortens such time period for good cause, as it deems just under the circumstances.

(d) The court may order a child to testify outside the physical presence of the accused, provided that the court finds by a preponderance of the evidence that such child is likely to suffer serious psychological or emotional distress or trauma which impairs such child's ability to communicate as a result of testifying in the presence of the accused. In determining whether a preponderance of the evidence has been shown, the court may consider any one or more of the following circumstances:

(1) The manner of the commission of the offense being particularly heinous or characterized by aggravating circumstances;

(2) The child's age or susceptibility to psychological or emotional distress or trauma on account of a physical or mental condition which existed before the alleged commission of the offense;

(3) At the time of the alleged offense, the accused was:

(A) The parent, guardian, legal custodian, or other person responsible for the custody or care of the child at the relevant time; or

(B) A person who maintains or maintained an ongoing personal relationship with such child's parent, guardian, legal custodian, or other person responsible for the custody or care of the child at the relevant time and the relationship involved the person living in or frequent and repeated presence in the same household or premises as the child;

(4) The alleged offense was part of an ongoing course of conduct committed by the accused against the child over an extended period of time;

(5) A deadly weapon or dangerous instrument was used during the commission of the alleged offense;

(6) The accused has inflicted serious physical injury upon the child;

(7) A threat, express or implied, of physical violence to the child or a third person if the child were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer, or law enforcement office concerning the incident has been made by or on behalf of the accused;

(8) A threat, express or implied, of the incarceration of a parent, relative, or guardian of the child, the removal of the child from the family, or the dissolution of the family of the child if the child were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer, or law enforcement office concerning the incident has been made by or on behalf of the accused;

(9) A witness other than the child has received a threat of physical violence directed at such witness or to a third person by or on behalf of the accused, and the child is aware of such threat;

(10) The accused, at the time of the inquiry:

(A) Is living in the same household with the child;

(B) Has ready access to the child; or

(C) Is providing substantial financial support for the child; or

(11) According to expert testimony, the child would be particularly susceptible to psychological or emotional distress or trauma if required to testify in open court in the physical presence of the accused.

(e) A court order allowing or not allowing a child to testify outside the physical presence of the accused shall state the findings of fact and

conclusions of law that support the court's determination. An order allowing the use of such testimony shall:

(1) State the method by which such child shall testify;

(2) List any individual or category of individuals allowed to be in the presence of such child during such testimony, including the individuals the court finds contribute to the welfare and well-being of the child during his or her testimony;

(3) State any special conditions necessary to facilitate the cross-examination of such child;

(4) State any condition or limitation upon the participation of individuals in the child's presence during such child's testimony;

(5) Provide that the accused shall not be permitted to be in the physical presence of a child during his or her testimony if the accused is pro se;

(6) Provide that if counsel for the accused or the accused is precluded from being physically present during the child's testimony, then the prosecuting attorney shall likewise be precluded from being physically present; and

(7) State any other condition necessary for taking or presenting such testimony.

(f) The method used for allowing a child to testify outside the physical presence of the accused shall allow the judge, jury, and accused to observe the demeanor of the child as if he or she were testifying in the courtroom. When such testimony occurs it shall be transmitted to the courtroom by any device or combination of devices capable of projecting a live visual and oral transmission, including, but not limited to, a two-way closed circuit television broadcast, an Internet broadcast, or other simultaneous electronic means. The court shall ensure that:

(1) The transmitting equipment is capable of making an accurate transmission and is operated by a competent operator;

(2) The transmission is in color and the child is visible at all times;

(3) Every voice on the transmission is audible and identified;

(4) The courtroom is equipped with monitors which permit the jury, the accused, and others present in the courtroom to see and hear the transmission; and

(5) The image and voice of the child, as well as the image of all other persons other than the operator present in the testimonial room, are transmitted live. (Code 1981, § 17-8-55, enacted by Ga. L. 2014, p. 205, § 1/HB 804.)

Effective date. — This Code section became effective July 1, 2014.

Editor's notes. — Ga. L. 2014, p. 205, § 1/HB 804, effective July 1, 2014, repealed former Code Section 17-8-55, pertaining to testimony of child ten years old or younger by closed circuit television, and enacted the present Code section. The former Code section was based on Ga. L. 1985, p. 1190, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1991, p. 1377, § 1.

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 75 (2014).

17-8-57. Expression or intimation of opinion by judge as to matters proved or guilt of accused.

(a)(1) It is error for any judge, during any phase of any criminal case, to express or intimate to the jury the judge's opinion as to whether a fact at issue has or has not been proved or as to the guilt of the accused.

(2) Any party who alleges a violation of paragraph (1) of this subsection shall make a timely objection and inform the court of the specific objection and the grounds for such objection, outside of the jury's hearing and presence. After such objection has been made, and if it is sustained, it shall be the duty of the court to give a curative instruction to the jury or declare a mistrial, if appropriate.

(b) Except as provided in subsection (c) of this Code section, failure to make a timely objection to an alleged violation of paragraph (1) of subsection (a) of this Code section shall preclude appellate review, unless such violation constitutes plain error which affects substantive rights of the parties. Plain error may be considered on appeal even when a timely objection informing the court of the specific objection was not made, so long as such error affects substantive rights of the parties.

(c) Should any judge express an opinion as to the guilt of the accused, the Supreme Court or Court of Appeals or the trial court in a motion for a new trial shall grant a new trial. (Laws 1850, Cobb's 1851 Digest, p. 462; Code 1863, § 3172; Code 1868, § 3183; Code 1873, § 3248; Code 1882, § 3248; Civil Code 1895, § 4334; Penal Code 1895, § 1032; Civil Code 1910, § 4863; Penal Code 1910, § 1058; Code 1933, § 81-1104; Code 1981, § 17-8-55; Code 1981, § 17-8-57, as redesignated by Ga. L. 1985, p. 1190, § 1; Ga. L. 2015, p. 1050, § 1/SB 99.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of this Code section for the former provisions, which read: "It is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused. Should any judge violate this Code section, the violation shall be held by the Supreme Court or Court of Appeals to be error and the decision in the case reversed, and a new trial granted in the court below with such directions as the Supreme Court or Court of Appeals may lawfully give."

JUDICIAL DECISIONS

Analysis

General Consideration

O.C.G.A. § 17-8-57 is limited to remarks made before the jury.

Appellant's plea counsel's failure to object to comments made by the trial judge during the plea hearing, comments which the appellant argued violated O.C.G.A. § 17-8-57, was not ineffective assistance; such an objection would have been meritless because § 17-8-57 only applied if a jury was present. Rhodes v. State, 296 Ga. 418, 768 S.E.2d 445 (2015).

Comments four years after verdict. — Judge's comment on the latent fingerprint cards, four years after the verdict, was not an opinion on guilt in violation of O.C.G.A. § 17-8-57. Moore v. State, 293 Ga. 676, 748 S.E.2d 419 (2013).

No violation of the statute.

Trial court did not violate O.C.G.A. § 17-8-57 when the court announced to a panel of the jury venire during preliminary instructions that the indicted offense of malice murder occurred in the subject county as the court was merely explaining what was alleged in the indictment against the defendant, not what had been proven. Lindsey v. State, 295 Ga. 343, 760 S.E.2d 170 (2014).

Expression of opinion on issue of fact is not harmless.

Defendant was entitled to a new trial because by stating to the jury venire that the crime happened in Taylor County, Georgia, the trial court judge expressed or intimated the court's opinion as to a disputed issue of fact and thus violated O.C.G.A. § 17-8-57. Sales v. State, 296 Ga. 538, 769 S.E.2d 374 (2015).

Comments on venue. — Trial court's statement to the venire that the crime took place in Muscogee County expressed or intimated the court's opinion as to a disputed issue of fact at trial in violation of O.C.G.A. § 17-8-57, and entitled the defendant to a new trial. Rouse v. State, 296 Ga. 213, 765 S.E.2d 879 (2014).

Comments regarding pretrial procedure. — Although the trial court's comments to the jury venire three weeks prior to their service may have come close to commenting on the defendant's guilt or innocence, they were made to explain the procedure leading up to the jurors' service and thus, did not necessitate a new trial. Hicks v. State, 326 Ga. App. 46, 755 S.E.2d 855 (2014).

Comment intimating court's opinion on credibility of witness. — Defendant was entitled to a new trial because the trial court erred in asking a witness whether the witness was lying or being truthful, intimating the court's opinion regarding the credibility of the witness's testimony. Williams v. State, 329 Ga. App. 706, 766 S.E.2d 474 (2014).

Expression of opinion about witness's credibility.

Trial court's admonition to defense counsel and instructions to the jury to disregard defense counsel's challenge to an officer's credibility clearly intimated the court's opinion that the officer's testimony was believable and violated O.C.G.A. § 17-8-57, and the purported curative instruction did not eradicate the trial court's inappropriate comments. Wilson v. State, 325 Ga. App. 859, 755 S.E.2d 253 (2014).

Remarks not opinion.

Judge's friendly exchange with the assistant district attorney and a witness did not amount to an impermissible comment on the witness's credibility. Griffin v. State, 331 Ga. App. 550, 769 S.E.2d 514 (2015).

No violation by judge.

At defendant's trial for drug possession and sale, O.C.G.A. § 17-8-57 was not violated when the trial judge commented on the sufficiency of the evidence because the purpose of § 17-8-57 is to prevent the jury from being influenced, and the jury was

not present at the time of the remarks. Clowers v. State, 324 Ga. App. 264, 750 S.E.2d 169 (2013).

Comment by the trial judge that a crime was no less punishable if committed against a bad person than a good person was not reversible error as the jury was instructed not to construe any comment by the trial court as an expression of opinion upon the facts or evidence, credibility of witnesses, or guilt or innocence of the accused. Murray v. State, 295 Ga. 289, 759 S.E.2d 525 (2014).

Court's statement requiring that the medical examiner state that the autopsy photographs would assist the medical examiner's testimony did not express or intimate an opinion in alignment with the state. Allen v. State, 296 Ga. 785, 770 S.E.2d 824 (2015).

Plain error doctrine not applicable. — Defendant was not entitled to a plain error review of a colloquy at trial, held outside the jury's presence, between the court and a witness called by the state who was reluctant to testify because the alleged error did not involve error in the sentencing phase of a trial resulting in the death penalty, in a trial judge's expression of opinion to the jury, or in the jury charge. Solomon v. State, 293 Ga. 605, 748 S.E.2d 865 (2013).

Cited in Martinez v. State, 325 Ga. App. 267, 750 S.E.2d 504 (2013).

Inquiries by the Judge

Inquiry of witness for clarification. Because the presiding judge's questions about how the defendant shot backwards and how many shots the defendant fired were interposed to clarify the defendant's testimony and to develop the truth in the defendant's case, the superior court erred in finding that the questions constituted a violation of this statute, and the defendant was not entitled to a new trial on that basis. State v. Nickerson, 324 Ga. App. 576, 749 S.E.2d 768 (2013).

Trial court did not violate O.C.G.A. § 17-8-57 when the court questioned a witness at trial about a prior statement to police because the question only asked for clarification of whom the witness was referring to when the witness used a plural pronoun and did not express or intimate an opinion regarding the credibility of the evidence being offered or the guilt of the accused. Alexander v. State, 294 Ga. 345, 751 S.E.2d 408 (2013).

Trial court did not improperly comment on the evidence during the defendant's cross-examination because the trial court attempted to clarify the defendant's testimony as to whether the defendant, an attorney, had a duty to correct a client's misstatement and, in so doing, did not express an opinion as to the defendant's guilt or credibility; and the trial court cautioned the jury explicitly that no ruling or comment which the trial court made during the trial was intended to express any opinion upon the facts of the case, upon the credibility of the witnesses, upon the evidence, or upon the guilt or innocence of the defendant. Sallee v. State, 329 Ga. App. 612, 765 S.E.2d 758 (2014).

Judge's expression that detectives conduct was "quite all right". — Trial court violated O.C.G.A. § 17-8-57 in commenting to the jury that it was "quite all right" for detectives to provide false information to a suspect during a custodial interview to "test" the suspects; the trial court went beyond ruling that defense counsel's question was argumentative to gratuitously commenting on the propriety of the lead detective's technique. Haymer v. State, 323 Ga. App. 874, 747 S.E.2d 512 (2013).

Expression of opinion as to an uncontested and undisputed fact concerning Intoxilyzer. — When the trial court made the court's comments regarding the history of the Intoxilyzer, defense counsel expressly agreed with the comments and then went on to clarify counsel's question about the history of the Intoxilyzer to the patrol officer. As such, the statement by the trial court concerning a fact that was uncontested or was not in dispute did not constitute a violation of O.C.G.A. § 17-8-57. Rolland v. State, 321 Ga. App. 661, 742 S.E.2d 482 (2013).

Rulings by the Judge

Trial court's simple statement sustaining an objection did not in any way implicate O.C.G.A. § 17-8-57.

Trial court did not violate O.C.G.A. § 17-8-57 when the court sustained the

Rulings by the Judge (Cont'd)

prosecutor's objection to defense counsel's closing argument. Jarnigan v. State, No. S14A0191, 2014 Ga. LEXIS 550 (June 30, 2014).

Comment on voluntariness of confession held reversible error.

When the defendant was convicted of malice murder and possession of a firearm during the commission of a crime in connection with the death of the victim, a new trial was necessary because, when the state sought to introduce a recording of the second interview with the defendant, the trial court improperly commented on the evidence by stating that the court had already ruled that the defendant's statement was freely and voluntarily given. Freeman v. State, 295 Ga. 820, 764 S.E.2d 390 (2014).

Lack of appellate jurisdiction for improper questioning by judge. — Because the defendant did not file either a cross-appeal to the state's appeal or a separate notice of appeal regarding the superior court's adverse rulings on the other alleged violations of the statute regarding the presiding judge's allegedly improper questioning of the defendant, the appellate court lacked jurisdiction to consider the defendant's allegations of error arising from the superior court's adverse rulings. State v. Nickerson, 324 Ga. App. 576, 749 S.E.2d 768 (2013).

Jury Charges and Curative Instructions

O.C.G.A. § 17-8-57 violated only when charge intimates opinion of judge as to evidence.

Trial court's instruction on a statement by a child describing sexual contact or physical abuse was erroneous as the jurors could have reasonably taken the instruction to be an expression or intimation of the trial court's opinion that the child's statements were reliable or true. Palmer v. State, 330 Ga. App. 870, 769 S.E.2d 600 (2015).

Charging point of law.

Judge's reference in jury instructions to "the deadly weapon used by the defendant" was not an improper opinion that the gun used was a "deadly weapon" and that the defendant was the person who used the gun to kill the victim; rather, the statement was drawn verbatim from a case holding that it was not necessary for the state to admit into evidence the deadly weapon used by the defendant, and referred to "defendant" generically. Wells v. State, 295 Ga. 161, 758 S.E.2d 598 (2014).

Charge on impeachment.

Trial judge's charge to jury on impeachment of a witness by a prior conviction did not amount to an improper comment on the evidence as the prior conviction was undisputed and the charge did not require the jury to disbelieve the defendant's testimony based on the prior conviction. Coleman v. State, 325 Ga. App. 700, 753 S.E.2d 449 (2014).

Explanation of rule of sequestration. — Trial court judge did not violate O.C.G.A. § 17-8-57 by expressing an opinion in providing the explanation of the rule of sequestration because it was not a prohibited expression of opinion, was not a comment on the credibility of any of the witnesses, and was a neutral explanation of the rule of sequestration that did not favor either party. Booker v. State, 322 Ga. App. 257, 744 S.E.2d 429 (2013).

Instruction limiting jury's consideration of testimony. — Trial court's jury instructions did not violate O.C.G.A. § 17-8-57 because the instructions limiting the evidence that the jury could consider from a detective's testimony did not express or intimate the trial court's opinion with regard to the defendant's guilt or innocence. Graves v. State, 322 Ga. App. 24, 743 S.E.2d 582 (2013).

17-8-58. Objections to jury charges prior to the jury retiring to deliberate; failure to raise objections.

JUDICIAL DECISIONS

ANALYSIS

General Considerations

Failure to instruct on robbery by intimidation. — Trial court did not commit plain error in failing to charge the jury on robbery by intimidation as a lesser-included offense of armed robbery because the defendant denied committing any offense; and the evidence relied upon by the defendant did not show robbery by intimidation as there was no evidence that a robbery was committed without the use of a gun. Styles v. State, 329 Ga. App. 143, 764 S.E.2d 166 (2014).

Jury's return of not guilty verdicts on all 12 counts of possession of a firearm during the commission of a felony did not demonstrate that, had the jury been instructed on robbery by intimidation, it would have convicted the defendant of that lesser included offense, rather than of armed robbery; thus, the trial court did not commit plain error in failing to charge the jury on robbery by intimidation as a lesser-included offense of armed robbery. Styles v. State, 329 Ga. App. 143, 764 S.E.2d 166 (2014).

Instruction on justification not plain error. — Defendant failed to show plain error in the jury charge on justification because the defendant could not demonstrate that the alleged error in the jury charge likely affected the outcome of the proceedings as the evidence was overwhelming that the defendant was the initial aggressor who attacked the unarmed victim with the metal bar and, thus, that the defendant did not act in self-defense and was guilty of aggravated assault. Tremblay v. State, 329 Ga. App. 139, 764 S.E.2d 163 (2014).

No plain error by giving jury charge on entire definition of trafficking. — Trial court did not commit plain error by charging the jury on the entire definition of trafficking as no evidence was introduced at trial suggesting that the defendant brought the cocaine at issue into the state, sold the cocaine, or that the defendant delivered the cocaine to anyone; rather, the evidence showed only that the defendant was in knowing possession of the cocaine for a brief period of time, thus, there was no reasonable possibility that the jury convicted the defendant of trafficking in a manner not charged in the indictment. Hernandez-Garcia v. State, 322 Ga. App. 455, 745 S.E.2d 706 (2013).

Cited in Stacey v. State, 292 Ga. 838, 741 S.E.2d 881 (2013); Mathis v. State, 293 Ga. 35, 743 S.E.2d 393 (2013); Ferguson v. State, 322 Ga. App. 565, 745 S.E.2d 784 (2013); Fleming v. State, 324 Ga. App. 481, 749 S.E.2d 54 (2013); Harris v. State, 324 Ga. App. 411, 750 S.E.2d 721 (2013); McBurrows v. State, 325 Ga. App. 303, 750 S.E.2d 436 (2013); Long v. State, 324 Ga. App. 882, 752 S.E.2d 54 (2013); Pitchford v. State, 294 Ga. 230, 751 S.E.2d 785 (2013); Gilliland v. State, 325 Ga. App. 854, 755 S.E.2d 249 (2014); Easter v. State, 327 Ga. App. 754, 761 S.E.2d 149 (2014); Whiting v. State, 296 Ga. 429, 768 S.E.2d 448 (2015).

Appellate Review

Challenge to jury instruction waived.

Because, when the jury at the defendant's enticement of a child trial submitted a note asking "Does child molestation require sex?" the defendant's counsel suggested that the trial court tell the jury to refer back to the jury charge and indictment, which the trial court did; therefore,the defendant waived review of this issue on appeal. Wheeler v. State, 327 Ga. App. 313, 758 S.E.2d 840 (2014).

No plain error found.

Defendant was not entitled to reversal

Appellate Review (Cont'd)

under a plain error analysis because it was not highly probable that any error in the response to a question from the jury about the elements of felony obstruction of an officer affected the outcome of the proceedings. Carlson v. State, 329 Ga. App. 309, 764 S.E.2d 890 (2014).

Trial court did not commit reversible error by failing to instruct the jury on the defense of accident because, as to the count for child molestation by showing the first victim photos of nude persons and persons performing sexual acts, the defendant claimed that the defendant never committed such an act and, thus, could not claim it was an accident, and as to the other two counts, any error in failing to give such an instruction was not plain because the charge given fairly instructed the jury that the jury had a duty to acquit the defendant if the jury determined the state failed to prove the defendant's guilt beyond a reasonable doubt. Ogletree v. State, 322 Ga. App. 103, 744 S.E.2d 96 (2013).

Trial counsel's failure to object to a jury instruction on prior consistent statements did not amount to plain error because the instruction did not affect the outcome of the trial since such an instruction does not explicitly direct the jury to place any additional weight on prior consistent statements beyond that which the law already gives them. Gaither v. State, 321 Ga. App. 643, 742 S.E.2d 158 (2013).

Defense counsel was not ineffective for failing to request a charge on accomplice corroboration because the accomplice was not the only witness; thus, there was no plain error in failing to give the accomplice corroboration charge since the state relied on other evidence apart from the accomplice's testimony. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

Trial court did not commit plain error as to the jury charge regarding malice murder and felony murder because the defendant failed to demonstrate that the alleged error in the jury charge likely affected the outcome of the proceedings since the defendant was not convicted of either malice murder or felony murder. Booker v. State, 322 Ga. App. 257, 744 S.E.2d 429 (2013).

Under a plain error analysis in the defendant's trial for murder, the trial court did not err when the court failed to charge the jury that one acting in defense of self has no duty to retreat because the jury charges given in the case fairly informed the jury as to the law of self-defense and the defendant failed to affirmatively show that the failure to charge on the duty to retreat probably affected the outcome of the trial. Shaw v. State, 292 Ga. 871, 742 S.E.2d 707 (2013).

Failure to charge the jury on accident did not amount to plain error because the evidence did not warrant such a charge; the only evidence of unintentional touching occurred in the context of typical family play wholly unrelated to the incidents for which the defendant was convicted. Haithcock v. State, 320 Ga. App. 886, 740 S.E.2d 806 (2013).

In an indictment alleging that the defendant committed the offense of aggravated assault by making an assault upon one of the victims by pointing a deadly weapon at that victim, the jury charge improperly placed on the state the extra burden of showing that, in addition to assaulting with a deadly weapon, the defendant also assaulted with the intent to murder, rape, or rob; however, because the defendant was convicted of aggravated assault, the additional burden on the state could not be deemed to have likely affected the outcome, and did not constitute plain error. Staley v. State, 330 Ga. App. 501, 767 S.E.2d 507 (2014).

In the defendant's trial for murder of another inmate, no evidence warranted instructions on voluntary manslaughter and mutual combat because te defendant testified the defendant acted in self-defense in the fight and did not intend to kill the victim, while eyewitnesses described the defendant as chasing the victim. Ruffin v. State, 296 Ga. 262, 765 S.E.2d 913 (2014).

In light of the overwhelming evidence of the defendant's guilt, any error in the trial court's instruction to the jury that a handgun was a deadly weapon as a matter of law did not seriously affect the fairness, integrity, or public reputation of the proceedings. Howell v. State, 330 Ga. App. 668, 769 S.E.2d 98 (2015).

Defendant could not demonstrate that any error in the charge relating to the use of the defendant's audio-recorded statement for impeachment purposes had any effect on the outcome at trial as the jury was authorized to consider the defendant's video-recorded, incriminating statements made at the sheriff's office, irrespective of whether the jury found that the prior audio-recorded statement made during the execution of the search warrant was obtained in violation of Miranda; and the jury had before the jury the defendant's initial incriminating statements made to the county investigator in the living room during the execution of the search warrant that were not included on the audio recording made by the Georgia Bureau of Investigation special agent. McCullough v. State, 330 Ga. App. 716, 769 S.E.2d 138 (2015).

When the defendant was convicted of five counts of sexual exploitation of children, although it was error for the trial court to charge the jury on the law of deliberate ignorance, the error did not rise to the level of plain error because there was no evidence that the defendant was aware of a high probability of the existence of child pornography on the defendant's laptop and purposefully contrived to avoid learning of that fact to have a defense in the event of criminal prosecution as the conflicting evidence pointed either to the defendant having actual knowledge of the child pornography on the defendant's laptop or no knowledge at all. Furthermore, there was no plain error in the trial court's charge on the law of equal access based on the language in the charge regarding the defendant's knowledge as it would have been clear to the jury that to convict the defendant, the defendant had to knowingly possess the child pornography found on the defendant's laptop. McCullough v. State, 330 Ga. App. 716, 769 S.E.2d 138 (2015).

Trial court's failure to charge on voluntary manslaughter was not plain error because there was no evidence that the other gang members had guns or shot at the appellant, and the only shell casings at the scene were found where appellant was seen firing a gun, plus, even if words were exchanged prior to the event, as a matter of law, angry statements alone ordinarily did not amount to serious provocation within the meaning of a voluntary manslaughter charge. Jones v. State, 296 Ga. 663, 769 S.E.2d 901 (2015).

Plain error doctrine not applicable. — Defendant was not entitled to plain error review of a colloquy at trial, held outside the jury's presence, between the court and a witness called by the state who was reluctant to testify, because the alleged error did not involve error in the sentencing phase of a trial resulting in the death penalty, in a trial judge's expression of opinion to the jury, or in the jury charge. Solomon v. State, 293 Ga. 605, 748 S.E.2d 865 (2013).

Erroneous jury charge not excused. There was no plain error in the trial court's charge to the jury because the trial court gave an appropriate limiting instruction prior to the admission of the similar transaction evidence and because the purposes cited in the trial court's final charge were permissible and relevant to the state's case. Griffin v. State, 327 Ga. App. 751, 761 S.E.2d 146 (2014).

No failure to distinguish between civil and criminal liability. — Trial court did not commit plain error with regard to the instruction on reckless driving and reckless disregard by purportedly failing to sufficiently distinguish between civil and criminal as reviewing both the recharge and the initial charge together the appellate court failed to see how the jury was confused to the extent that the defendant was convicted on a lower level of criminal intent. Lauderback v. State, 320 Ga. App. 649, 740 S.E.2d 377 (2013).

ARTICLE 4

CONDUCT AND ARGUMENT OF COUNSEL

17-8-71. Order of argument after evidence presented.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Ineffectiveness of counsel.

Defendant failed to establish ineffective assistance of counsel on the ground that trial counsel called the defendant as the only defense witness because under the version of O.C.G.A. § 17-8-71 in effect at the time of trial, a criminal defendant had the right to make the final closing argument to the jury if the defendant presented no evidence; thus, it was a reasonable trial strategy not to present evidence in order to preserve the right to close and despite that initial strategy being defeated when one of the codefendants introduced documentary evidence, the defendant failed to demonstrate that trial counsel failed to perform effectively once the trial strategy changed mid-trial. Bulloch v. State, 293 Ga. 179, 744 S.E.2d 763 (2013).

17-8-73. Time limits on closing argument — Noncapital and capital felony cases.

JUDICIAL DECISIONS

Ineffective assistance.

As to the defendant's habeas claim that the defendant's trial counsel was ineffective for failing to use counsel's entire two hours for closing argument as provided in O.C.G.A. § 17-8-73, because kidnapping with bodily injury was a capital offense, but counsel believed counsel only had 30 minutes, there was no showing that trial counsel could have convinced the jury that the client was innocent of the crimes charged. Wilkerson v. Hart, 294 Ga. 605, 755 S.E.2d 192 (2014).

17-8-75. Improper statements by counsel.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
REQUIREMENT THAT OBJECTION OR MOTION BE MADE
REBUKE OF COUNSEL, INSTRUCTION OF JURY, OR GRANT OF MOTION BY COURT
DISCRETION OF COURT

General Consideration

Harmless error.

Trial court's error in failing to remedy the impact of the prejudicial statements by the prosecutor, if any, was harmless. Given the overwhelming evidence of the defendant's guilt, including the defendant's custodial confession, it was highly probable that the trial court's error, if any,

did not contribute to the verdict. Geiger v. State, 295 Ga. 190, 758 S.E.2d 808 (2014).

Cited in Johnson v. State, 293 Ga. 641, 748 S.E.2d 896 (2013).

Requirement that Objection or Motion Be Made

Failure to object to closing argument. — Trial counsel was not ineffective for failing to object to a portion of the state's closing argument because counsel stated that the prosecutor was heard using the newspaper analogy in other cases and counsel strategically decided not to object, choosing instead to comment on the prosecution's theatrics in closing as a way to turn the prosecutor's remarks to the appellant's advantage. Smith v. State, 296 Ga. 731, 770 S.E.2d 610 (2015).

Rebuke of Counsel, Instruction of Jury, or Grant of Motion by Court

Improper remark of prosecutor not cured by instruction. — General curative instruction given by the trial court after the prosecutor made an improper statement about the defendant's link to an earlier gang-related shooting during closing arguments was an inadequate curative measure and did not serve to remove the improper impression for the jurors' minds as required by O.C.G.A. § 17-8-75. Jones v. State, 292 Ga. 656, 740 S.E.2d 590 (2013).

Prosecutor's remark not improper. Instruction pursuant to O.C.G.A. § 17-8-75 was not required as the state's references in closing argument were to the psychologist's forensic findings and the inferences thereto, not to any opinion as to the veracity of the victim. Thompson v. State, 321 Ga. App. 756, 743 S.E.2d 446 (2013).

Discretion of Court

Discretion not abused in denying mistrial if counsel rebuked and jury instructed.

Trial court did not abuse the court's discretion in declining to grant a mistrial after an improper statement by the prosecutor as the court immediately sustained the defendant's objection, rebuked the prosecutor, and instructed the jury not to consider the statement. Campbell v. State, 329 Ga. App. 317, 764 S.E.2d 895 (2014).

17-8-76. Argument to or in front of jury as to possibility of clemency.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Ineffective assistance of counsel claim procedurally barred. — Defendant's claim that trial counsel was ineffective for failing to object to the prosecutor's improper closing argument that life did not mean life was procedurally barred because the defendant did not raise it in the motion for new trial and did not obtain a ruling on the motion by the trial court. Cowart v. State, 294 Ga. 333, 751 S.E.2d 399 (2013).

Objection and motion for mistrial after prosecutor's argument ended was untimely. — Defendant's objection and motion for mistrial, made after the prosecutor's improper closing argument that life did not mean life ended, were not timely and were not preserved for appeal. Cowart v. State, 294 Ga. 333, 751 S.E.2d 399 (2013).

CHAPTER 9

VERDICT AND JUDGMENT GENERALLY

ARTICLE 1

GENERAL PROVISIONS

17-9-1. When direction of verdict of acquittal authorized; when motion for directed verdict of acquittal allowed; effect of motion upon defendant's right to present evidence and right to jury trial; assent of jury not required.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

Distinction between legally insufficient evidence and verdict against weight of evidence. — Trial court's review of the evidence under O.C.G.A. § 5-5-21 differs from the court's review of the evidence on a motion for a directed verdict under O.C.G.A. § 17-9-1. In the latter case, the trial court has a duty to grant a directed verdict of acquittal when there is no conflict in the evidence and it clearly demands a verdict of acquittal as a matter of law. Lavertu v. State, 325 Ga. App. 709, 754 S.E.2d 663 (2014).

Directed verdict in shoplifting cases.

Trial court did not err by denying the defendant's motion for a directed verdict of acquittal with regard to the defendant's trial for felony shoplifting because the testimony of the store's loss prevention officer established each element of the crime and provided sufficient evidence to support the conviction. Parham v. State, 320 Ga. App. 676, 739 S.E.2d 135 (2013).

17-9-4. Validity of judgment rendered by court having no jurisdiction of person or subject matter.

JUDICIAL DECISIONS

Merger claims cannot be deemed waived. — Merger claims cannot be waived, even following a guilty plea, because a conviction that merges as a matter of law or fact with another conviction is void, and any resulting sentence is void and illegal, which means that the sentences may be challenged in any proper proceeding. Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

ARTICLE 3

AMENDMENT AND IMPEACHMENT OF VERDICT

17-9-40. Amendment of verdict after dispersion of jury.

JUDICIAL DECISIONS

Juror's affidavit should not have been considered to impeach a verdict. — Habeas court erred in setting aside a murder conviction based on claims that counsel was ineffective in failing to challenge an alternate juror, who was seated after the juror had been excused and had researched the case on the Internet, because the juror's affidavit should not have been considered to impeach the verdict, pursuant to O.C.G.A. § 17-9-40, and the research was not the type of conduct that deprived the petitioner of a fair trial. O'Donnell v. Smith, 294 Ga. 307, 751 S.E.2d 324 (2013).

ARTICLE 4

MOTIONS IN ARREST

17-9-61. Time and grounds for motion generally.

JUDICIAL DECISIONS

Cited in Fouts v. State, 322 Ga. App. 261, 744 S.E.2d 451 (2013); Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

CHAPTER 10

SENTENCE AND PUNISHMENT

Article 1

Procedure for Sentencing and Imposition of Punishment

Sec.

ARTICLE 1

PROCEDURE FOR SENTENCING AND IMPOSITION OF PUNISHMENT

17-10-1. Fixing of sentence; suspension or probation of sentence; change in sentence; eligibility for parole; prohibited modifications; exceptions.

(a)(1) Except in cases in which life imprisonment, life without parole, or the death penalty may be imposed, upon a verdict or plea of guilty in any case involving a misdemeanor or felony, and after a presentence hearing, the judge fixing the sentence shall prescribe a determinate sentence for a specific number of months or years which shall be within the minimum and maximum sentences prescribed by law as the punishment for the crime. The judge imposing the sentence is granted power and authority to suspend or probate all or any part of the entire sentence under such rules and regulations as the judge deems proper, including service of a probated sentence in the sentencing options system, as provided by Article 9 of Chapter 8 of Title 42, and including the authority to revoke the suspension or probation when the defendant has violated any of the rules and regulations prescribed by the court, even before the probationary period has begun, subject to the conditions set out in this subsection; provided, however, that such action shall be subject to the provisions of Code Sections 17-10-6.1 and 17-10-6.2.

(2) Active probation supervision shall terminate in all cases no later than two years from the commencement of active probation supervision unless specially extended or reinstated by the sentencing court upon notice and hearing and for good cause shown; provided, however, that in those cases involving the collection of fines, restitution, or other funds, the period of active probation supervision shall remain in effect for so long as any such obligation is outstanding, or until termination of the sentence, whichever first occurs, and for those cases involving a conviction under Chapter 15 of Title 16, the "Georgia Street Gang Terrorism and Prevention Act," the period of active probation supervision shall remain in effect until the termination of the sentence, but shall not exceed five years unless as otherwise provided in this paragraph. Supervision shall not be required for defendants sentenced to probation while the defendant is in the legal custody of the Department of Corrections or the State Board of Pardons and Paroles.

(3)(A) Any part of a sentence of probation revoked for a violation other than a subsequent commission of any felony, a violation of a special condition, or a misdemeanor offense involving physical

violence resulting in bodily injury to an innocent victim which in the opinion of the trial court constitutes a danger to the community or a serious infraction occurring while the defendant is assigned to an alternative probation confinement facility shall be served in a probation detention center, probation boot camp, diversion center, weekend lock up, or confinement in a local jail or detention facility, or other community correctional alternatives available to the court or provided by the Department of Corrections.

(B) A parolee or probationer charged with a misdemeanor involving physical injury or an attempt to commit physical injury or terroristic threats or with a new felony shall not be entitled to bond pending a hearing on the revocation of his or her parole or probation, except by order of a judge of the superior, state, or magistrate court wherein the alleged new offense occurred after a hearing and upon determination of the superior, state, or magistrate court that the parolee or probationer does not constitute a threat to the community; provided, however, that this subparagraph does not authorize state or magistrate court judges to grant bail for a person charged with any offense listed in subsection (a) of Code Section 17-6-1.

(4) In cases of imprisonment followed by probation, the sentence shall specifically provide that the period of probation shall not begin until the defendant has completed service of the confinement portion of the sentence. No revocation of any part of a probated sentence shall be effective while a defendant is in the legal custody of the State Board of Pardons and Paroles.

(5)(A) When a defendant has been sentenced to probation, the court shall retain jurisdiction throughout the period of the probated sentence as provided for in subsection (g) of Code Section 42-8-34. Without limiting the generality of the foregoing, the court may shorten the period of active probation supervision or unsupervised probation on motion of the defendant or on its own motion, or upon the request of a community supervision officer, if the court determines that probation is no longer necessary or appropriate for the ends of justice, the protection of society, and the rehabilitation of the defendant. Prior to entering any order for shortening a period of probation, the court shall afford notice to the victim or victims of all sex related offenses or violent offenses resulting in serious bodily injury or death and, upon request of the victim or victims so notified, shall afford notice and an opportunity for hearing to the defendant and the prosecuting attorney.

(B) The Department of Community Supervision shall establish a form document which shall include the elements set forth in this Code section concerning notification of victims and shall make

copies of such form available to prosecuting attorneys in this state. When requested by the victim, the form document shall be provided to the victim by the prosecuting attorney. The form shall include the address of the community supervision office having jurisdiction over the case and contain a statement that the victim must maintain a copy of his or her address with the community supervision office and must notify the office of any change of address in order to maintain eligibility for notification by the Department of Community Supervision as required in this Code section.

(6)(A) Except as otherwise authorized by law, no court shall modify, suspend, probate, or alter a previously imposed sentence so as to reduce or eliminate a period of incarceration or probation and impose a financial payment which:

(i) Exceeds the statutorily specified maximum fine, plus all penalties, fees, surcharges, and restitution permitted or authorized by law; or

(ii) Is to be made to an entity which is not authorized by law to receive fines, penalties, fees, surcharges, or restitution.

(B) The prohibitions contained in this paragraph shall apply regardless of whether a defendant consents to the modification, suspension, probation, or alteration of such defendant's sentence and the imposition of such payment.

(C) Nothing in this paragraph shall prohibit or prevent a court from requiring, as a condition of suspension, modification, or probation of a sentence in a criminal case involving child abandonment, that the defendant pay all or a portion of child support which is owed to the custodial parent of a child which is the subject of such case.

(7) As used in this subsection, the term:

(A) "Active probation supervision" means the period of a probated sentence in which a probationer actively reports to his or her community supervision officer or is otherwise under the direct supervision of a community supervision officer.

(B) "Unsupervised probation" means the period of a probated sentence that follows active probation supervision in which:

(i) All of the conditions and limitations imposed by the court remain intact;

(ii) A probationer may have reduced reporting requirements; and

(iii) A community supervision officer shall not actively supervise such probationer.

(b) The judge, in fixing the sentence as prescribed in subsection (a) of this Code section, may make a determination as to whether the person being sentenced should be considered for parole prior to the completion of any requirement otherwise imposed by law relating to the completion of service of any specified time period before parole eligibility. In the event that the judge so determines, he may specify in the sentence that the person is sentenced under this subsection and may provide that the State Board of Pardons and Paroles, acting in its sole discretion, may consider and may parole any person so sentenced at any time prior to the completion of any minimum requirement otherwise imposed by law, rule, or regulation for the service of sentences or portions thereof. The determination allowed in this subsection shall be applicable to first offenders only.

(c) In any case in which a minor defendant who has not achieved a high school diploma or the equivalent is placed under a probated or suspended sentence, the court may require as a condition of probation or suspension of sentence that the defendant pursue a course of study designed to lead to achieving a high school diploma or the equivalent; and, in any case in which such a condition of probation may be imposed, the court shall give express consideration to whether such a condition should be imposed.

(d) In any case involving a misdemeanor or a felony in which the defendant has been punished in whole or in part by a fine, the sentencing judge shall be authorized to allow the defendant to satisfy such fine through community service as defined in Code Section 42-3-50. One hour of community service shall equal the dollar amount of one hour of paid labor at the minimum wage under the federal Fair Labor Standards Act of 1938, as now or hereafter amended, unless otherwise specified by the sentencing judge. A defendant shall be required to serve the number of hours in community service which equals the number derived by dividing the amount of the fine by the federal minimum hourly wage or by the amount specified by the sentencing judge. Prior to or subsequent to sentencing, a defendant may request the court that all or any portion of a fine may be satisfied under this subsection.

(e) In any case involving a felony in which the defendant previously appeared before a juvenile court, the records of the dispositions of the defendant as well as any evidence used in any juvenile court hearing shall be available to the district attorney, the defendant, and the superior court judge in determining sentencing as provided in Code Section 15-11-703.

(f) Within one year of the date upon which the sentence is imposed, or within 120 days after receipt by the sentencing court of the remittitur upon affirmance of the judgment after direct appeal, which-

ever is later, the court imposing the sentence has the jurisdiction, power, and authority to correct or reduce the sentence and to suspend or probate all or any part of the sentence imposed. Prior to entering any order correcting, reducing, or modifying any sentence, the court shall afford notice and an opportunity for a hearing to the prosecuting attorney. Any order modifying a sentence which is entered without notice and an opportunity for a hearing as provided in this subsection shall be void. This subsection shall not limit any other jurisdiction granted to the court in this Code section or as provided for in subsection (g) of Code Section 42-8-34.

(g)(1)(A) In sentencing a defendant convicted of a felony to probated confinement, the sentencing judge may make the defendant's participation in a work release program operated by a county a condition of probation, provided that such program is available and the administrator of such program accepts the inmate.

(B) Any defendant accepted into a county work release program shall thereby be transferred into the legal custody of the administrator of said program; likewise, any defendant not accepted shall remain in the legal custody of the Department of Corrections.

(2) Work release status granted by the court may be revoked for cause by the sentencing court in its discretion or may be revoked by the state or local authority operating the work release program for any reason for which work release status would otherwise be revoked.

(3) The provisions of this subsection shall not limit the authority of the commissioner to authorize work release status pursuant to Code Section 42-5-59 or apply to or affect the authority to authorize work release of county prisoners, which shall be as provided for in Code Sections 42-1-4 and 42-1-9 or as otherwise provided by law.

(4) This subsection shall not apply with respect to any violent felony or any offense for which the work release status is specifically prohibited by law, including but not limited to serious violent felonies as specified in Code Section 17-10-6.1. (Ga. L. 1919, p. 387, § 1; Code 1933, § 27-2502; Ga. L. 1950, p. 352, § 3; Ga. L. 1964, p. 483, §§ 2, 4; Ga. L. 1974, p. 352, §§ 3, 4; Ga. L. 1981, p. 1024, § 1; Ga. L. 1982, p. 3, § 17; Ga. L. 1984, p. 894, § 2; Ga. L. 1986, p. 842, § 1; Ga. L. 1988, p. 463, § 1; Ga. L. 1991, p. 310, § 1; Ga. L. 1992, p. 3221, § 1; Ga. L. 1993, p. 1654, § 1; Ga. L. 1994, p. 1959, § 9; Ga. L. 1995, p. 1043, § 1; Ga. L. 1996, p. 1257, § 1; Ga. L. 1998, p. 842, § 6; Ga. L. 2000, p. 20, § 7; Ga. L. 2001, p. 94, § 5; Ga. L. 2001, p. 1030, § 1; Ga. L. 2004, p. 775, § 1; Ga. L. 2005, p. 60, § 17/HB 95; Ga. L. 2006, p. 379, § 19/HB 1059; Ga. L. 2006, p. 710, § 7/SB 203; Ga. L. 2010, p. 230, § 10/HB 1015; Ga. L. 2012, p. 899, § 4-3/HB 1176; Ga. L. 2013,

p. 141, § 17/HB 79; Ga. L. 2013, p. 222, § 7/HB 349; Ga. L. 2013, p. 294, § 4-17/HB 242; Ga. L. 2015, p. 5, § 17/HB 90; Ga. L. 2015, p. 422, § 5-30/HB 310.)

The 2015 amendments. — The first 2015 amendment, effective March 13, 2015, inserted "of subsection (a)" in the first sentence of subsection (d). The second 2015 amendment, effective July 1, 2015, substituted "Supervision shall" for "Active probation supervision shall" at the beginning of the last sentence in paragraph (a)(2); substituted "community supervision officer" for "probation supervisor" in the second sentence in subparagraph (a)(5)(A); and, in subparagraph (a)(5)(B), substituted "Department of Community Supervision" for "Department of Corrections" in the first and last sentences, and substituted "community supervision office" for "probation office" twice in the last sentence; substituted "community supervision officer" for "probation supervisor" throughout paragraph (a)(7); and substituted "defined in Code Section 42-3-50" for "defined in paragraph (2) of Code Section 42-8-70" in the first sentence in subsection (d). See editor's note for applicability. See editor's note regarding the effect of these amendments.

Editor's notes. — Ga. L. 2015, p. 5, § 54(e)/HB 90, not codified by the General Assembly, provides: "In the event of a conflict between a provision in Sections 1 through 53 of this Act and a provision of another Act enacted at the 2015 regular session of the General Assembly, the provision of such other Act shall control over the conflicting provision in Sections 1 through 53 of this Act to the extent of the conflict." Accordingly, the amendment to subsection (d) of this Code section by Ga. L. 2015, p. 5, § 17/HB 90, was not given effect.

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration

Privatization of probation services. — In a suit brought by misdemeanor defendants challenging the privatization of probation services under O.C.G.A. § 42-8-100(g)(1), the Georgia Supreme Court agreed with the trial court that § 42-8-100(g)(1) was not unconstitutional on the statute's face and did not offend due process or equal protection nor condone imprisonment for debt. Sentinel Offender Svcs., LLC v. Glover, No. S14A1271, S14X1272, 2014 Ga. LEXIS 940 (Nov. 24, 2014).

Application to felony public indecency conviction. — Because the defendant's sex offender registration as part of probation was limited to the maximum sentence allowed by law as punishment for that crime, the trial court did not improperly give the defendant an indeterminate sentence by requiring the defendant to register as a sexual offender following the defendant's conviction for felony public indecency. Loya v. State, 321 Ga. App. 430, 740 S.E.2d 382 (2013).

Motion to vacate sentence was untimely filed.

Sentencing court lacked jurisdiction over the defendant's motion to vacate the defendant's sentence because the motion was filed three years after sentencing and the defendant did not assert a claim that the sentence was void, meaning that it was a sentence that the law did not allow. von Thomas v. State, 293 Ga. 569, 748 S.E.2d 446 (2013).

Cited in Parham v. State, 320 Ga. App.

General Consideration (Cont'd)

676, 739 S.E.2d 135 (2013); Myrick v. State, 325 Ga. App. 607, 754 S.E.2d 395 (2014).

Modification of Sentence

Failure to assert sentence was not allowed by law within required statutory time period.

Trial court did not err by denying the appellant's motion to modify the sentence for a robbery conviction because the motion was filed more than five years after the appellant filed the motion to withdraw the guilty plea; therefore, the appellant filed the motion to modify outside the statutory period set forth in O.C.G.A. § 17-10-1(f). Williams v. State, 331 Ga. App. 46, 769 S.E.2d 760 (2015).

Modification of conditions of probation.

Trial court did not err in denying the defendant's motion to vacate the defendant's sentence because the probation modification did not constitute punishment since the trial court retained jurisdiction to modify or change the probated sentence and changing the no violent contact order to no contact was not punishment but, rather, was for the purpose of protecting the victim. Bell v. State, 323 Ga. App. 751, 748 S.E.2d 114 (2013).

17-10-1.4. Split sentence.

(a) As used in this Code section, the term "split sentence" means any felony sentence that includes a term of imprisonment followed by a term of probation.

(b) In any case where a judge on or after July 1, 2015, sentences a defendant to a split sentence, post-incarceration supervision of the defendant shall be conducted exclusively by the Department of Community Supervision and not by the State Board of Pardons and Paroles, regardless of whether the defendant has served the full period of incarceration ordered in the sentence or has been released prior to the full period of incarceration by parole, conditional release, or other action of the State Board of Pardons and Paroles. (Code 1981, § 17-10-1.4, enacted by Ga. L. 2015, p. 422, § 5-31/HB 310.)

Effective date. — This Code section became effective July 1, 2015. See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides that: "This Act shall become effective July 1, 2015, and shall apply to sentences entered on or after such date."

17-10-2. Conduct of presentence hearings in felony cases; effect of reversal for error in presentence hearing.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Intent to use defendant's prior conviction at sentencing. — Because the trial court excluded defendant's prior conviction based upon a belief that the court had no discretion based on the state's failure to give notice of the state's intent to

use the prior conviction as required by O.C.G.A. § 17-16-4(a)(5), the trial court could consider the court's options under O.C.G.A. § 17-16-6 before re-sentencing. Kiser v. State, 327 Ga. App. 17, 755 S.E.2d 505 (2014).

Right of allocution.

Trial counsel was not ineffective in failing to object to the denial of the right to allocution as the defendant's right was not denied because, during sentencing, defense counsel made a brief statement on the defendant's behalf, describing the defendant's difficult life and upbringing, before the defendant directly addressed the trial court by informing the court of the time the defendant had already served with regard to the charges; and the trial court did not err in prohibiting the defendant from interrupting the court when the trial court was prepared to announce the court's sentence. Pepe-Frazier v. State, 331 Ga. App. 263, 770 S.E.2d 654 (2015).

17-10-3. Punishment for misdemeanors generally.

(a) Except as otherwise provided by law, every crime declared to be a misdemeanor shall be punished as follows:

(1) By a fine not to exceed $1,000.00 or by confinement in the county or other jail, county correctional institution, or such other places as counties may provide for maintenance of county inmates, for a total term not to exceed 12 months, or both;

(2) By confinement under the jurisdiction of the Board of Corrections in a state probation detention center or diversion center pursuant to Code Sections 42-8-35.4 and 42-8-35.5, for a determinate term of months which shall not exceed a total term of 12 months; or

(3) If the crime was committed by an inmate within the confines of a state correctional institution, by confinement under the jurisdiction of the Board of Corrections in a state correctional institution or such other institution as the Department of Corrections may direct for a term which shall not exceed 12 months.

(b) Either the punishment provided in paragraph (1) or (2) of subsection (a) of this Code section, but not both, may be imposed in the discretion of the sentencing judge. Misdemeanor punishment imposed under either paragraph may be subject to suspension or probation. The sentencing courts shall retain jurisdiction to amend, modify, alter, suspend, or probate sentences under paragraph (1) of subsection (a) of this Code section at any time, but in no instance shall any sentence under the paragraph be modified in a manner to place a county inmate under the jurisdiction of the Board of Corrections, except as provided in paragraph (2) of subsection (a) of this Code section.

(c) In all misdemeanor cases in which, upon conviction, a six-month sentence or less is imposed, it is within the authority and discretion of the sentencing judge to allow the sentence to be served on weekends by weekend confinement or during the nonworking hours of the defendant. A weekend shall commence and shall end in the discretion of the

sentencing judge, and the nonworking hours of the defendant shall be determined in the discretion of the sentencing judge; provided, however, that the judge shall retain plenary control of the defendant at all times during the sentence period. A weekend term shall be counted as serving two days of the full sentence. Confinement during the nonworking hours of a defendant during any day may be counted as serving a full day of the sentence.

(d) In addition to or instead of any other penalty provided for the punishment of a misdemeanor involving a traffic offense, or punishment of a municipal ordinance involving a traffic offense, with the exception of habitual offenders sentenced under Code Section 17-10-7, a judge may impose any one or more of the following sentences:

(1) Reexamination by the Department of Driver Services when the judge has good cause to believe that the convicted licensed driver is incompetent or otherwise not qualified to be licensed;

(2) Satisfactory completion of a defensive driving course or defensive driving program approved by the Department of Driver Services;

(3) Within the limits of the authority of the charter powers of a municipality or the punishment prescribed by law in other courts, imprisonment at times specified by the court or release from imprisonment upon such conditions and at such times as may be specified; or

(4) Probation or suspension of all or any part of a penalty upon such terms and conditions as may be prescribed by the judge. The conditions may include driving with no further motor vehicle violations during a specified time unless the driving privileges have been or will be otherwise suspended or revoked by law; reporting periodically to the court or a specified agency; and performing, or refraining from performing, such acts as may be ordered by the judge.

(e) Any sentence imposed under subsection (d) of this Code section shall be reported to the Department of Driver Services as prescribed by law.

(f) The Department of Community Supervision shall lack jurisdiction to supervise misdemeanor offenders, except when the sentence is made concurrent to a probated felony sentence or as provided in Code Section 42-8-109.5. Except as provided in this subsection, the Department of Corrections shall lack jurisdiction to confine misdemeanor offenders.

(g) This Code section will have no effect upon any offender convicted of a misdemeanor offense prior January 1, 2001, and sentenced to confinement under the jurisdiction of the Board of Corrections or to the supervision of the Department of Corrections. (Orig. Code 1863,

§ 4209; Ga. L. 1865-66, p. 233, § 2; Code 1868, §§ 4245, 4608; Code 1873, §§ 4310, 4705; Ga. L. 1878-79, p. 54, § 1; Code 1882, §§ 4310, 4705; Ga. L. 1895, p. 63, § 2; Penal Code 1895, § 1039; Ga. L. 1908, p. 1119, § 1; Penal Code 1910, § 1065; Code 1933, § 27-2506; Ga. L. 1956, p. 161, § 4; Ga. L. 1957, p. 477, § 5; Ga. L. 1964, p. 485, § 1; Ga. L. 1970, p. 236, § 10; Ga. L. 1972, p. 600, § 1; Ga. L. 1974, p. 361, § 1; Ga. L. 1974, p. 631, § 1; Ga. L. 1976, p. 210, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 1992, p. 3221, § 2; Ga. L. 1997, p. 1526, § 1; Ga. L. 2000, p. 1643, § 1; Ga. L. 2001, p. 1030, § 2; Ga. L. 2002, p. 415, § 17; Ga. L. 2005, p. 334, § 7-4/HB 501; Ga. L. 2014, p. 710, § 1-3/SB 298; Ga. L. 2015, p. 422, § 5-32/HB 310.)

The 2014 amendment, effective July 1, 2014, substituted the present provisions of paragraph (d)(2) for the former provisions, which read: "Attendance at, and satisfactory completion of, a driver improvement course meeting standards approved by the court;".

The 2015 amendment, effective July 1, 2015, in subsection (f), in the first sentence, substituted "Department of Community Supervision" for "Department of Corrections" near the beginning and added "or as provided in Code Section 42-8-109.5" at the end. See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For note, "Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors' Prison System," see 48 Ga. L. Rev. 227 (2013).

17-10-6.1. Punishment for serious violent offenders; authorization for reduction in mandatory minimum sentencing.

(a) As used in this Code section, the term "serious violent felony" means:

(1) Murder or felony murder, as defined in Code Section 16-5-1;

(2) Armed robbery, as defined in Code Section 16-8-41;

(3) Kidnapping, as defined in Code Section 16-5-40;

(4) Rape, as defined in Code Section 16-6-1;

(5) Aggravated child molestation, as defined in subsection (c) of Code Section 16-6-4, unless subject to the provisions of paragraph (2) of subsection (d) of Code Section 16-6-4;

(6) Aggravated sodomy, as defined in Code Section 16-6-2; or

(7) Aggravated sexual battery, as defined in Code Section 16-6-22.2.

(b)(1) Except as provided in subsection (e) of this Code section, any person convicted of the serious violent felony of kidnapping involving

a victim who is 14 years of age or older or armed robbery shall be sentenced to a mandatory minimum term of imprisonment of ten years, and no portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court.

(2) Except as provided in subsection (e) of this Code section, the sentence of any person convicted of the serious violent felony of:

(A) Kidnapping involving a victim who is less than 14 years of age;

(B) Rape;

(C) Aggravated child molestation, as defined in subsection (c) of Code Section 16-6-4, unless subject to the provisions of paragraph (2) of subsection (d) of Code Section 16-6-4;

(D) Aggravated sodomy, as defined in Code Section 16-6-2; or

(E) Aggravated sexual battery, as defined in Code Section 16-6-22.2

shall, unless sentenced to life imprisonment, be a split sentence which shall include a mandatory minimum term of imprisonment of 25 years, followed by probation for life, and no portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court.

(3) No person convicted of a serious violent felony shall be sentenced as a first offender pursuant to Article 3 of Chapter 8 of Title 42, relating to probation for first offenders, or any other provision of Georgia law relating to the sentencing of first offenders. The State of Georgia shall have the right to appeal any sentence which is imposed by the superior court which does not conform to the provisions of this subsection in the same manner as is provided for other appeals by the state in accordance with Chapter 7 of Title 5, relating to appeals or certiorari by the state.

(c)(1) Except as otherwise provided in subsection (c) of Code Section 42-9-39, for a first conviction of a serious violent felony in which the accused has been sentenced to life imprisonment, that person shall not be eligible for any form of parole or early release administered by the State Board of Pardons and Paroles until that person has served a minimum of 30 years in prison. The minimum term of imprisonment shall not be reduced by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections.

(2) For a first conviction of a serious violent felony in which the accused has been sentenced to death but the sentence of death has

been commuted to life imprisonment, that person shall not be eligible for any form of parole or early release administered by the State Board of Pardons and Paroles until that person has served a minimum of 30 years in prison. The minimum term of imprisonment shall not be reduced by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections.

(3) For a first conviction of a serious violent felony in which the accused has been sentenced to imprisonment for life without parole, that person shall not be eligible for any form of parole or early release administered by the State Board of Pardons and Paroles or for any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections.

(4) Except as otherwise provided in this subsection, any sentence imposed for the first conviction of any serious violent felony shall be served in its entirety as imposed by the sentencing court and shall not be reduced by any form of parole or early release administered by the State Board of Pardons and Paroles or by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the period of incarceration ordered by the sentencing court; provided, however, that during the final year of incarceration an offender so sentenced shall be eligible to be considered for participation in a department administered transitional center or work release program.

(d) For purposes of this Code section, a first conviction of any serious violent felony means that the person has never been convicted of a serious violent felony under the laws of this state or of an offense under the laws of any other state or of the United States, which offense if committed in this state would be a serious violent felony. Conviction of two or more crimes charged on separate counts of one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction.

(e) In the court's discretion, the judge may depart from the mandatory minimum sentence specified in this Code section for a person who is convicted of a serious violent felony when the prosecuting attorney and the defendant have agreed to a sentence that is below such mandatory minimum.

(f) Any sentence imposed pursuant to this Code section shall not be reduced by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the

period of incarceration ordered by the sentencing court or any form of pardon, parole, or commutation of sentence by the State Board of Pardons and Paroles; provided, however, that during the final year of incarceration, a defendant so sentenced shall be eligible to be considered for participation in a Department of Corrections administered transitional center or work release program. (Code 1981, § 17-10-6.1, enacted by Ga. L. 1994, p. 1959, § 11; Ga. L. 1998, p. 180, § 2; Ga. L. 2006, p. 379, § 20/HB 1059; Ga. L. 2009, p. 64, § 1/SB 193; Ga. L. 2009, p. 223, § 3/SB 13; Ga. L. 2011, p. 752, § 17/HB 142; Ga. L. 2013, p. 222, § 8/HB 349; Ga. L. 2014, p. 866, § 17/SB 340.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, substituted "however, that during" for "however, during" in paragraph (c)(4).

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013). For annual survey on criminal law, see 66 Mercer L. Rev. 37 (2014).

JUDICIAL DECISIONS

Analysis

General Considerations

General Considerations

Cited in Freeman v. State, 328 Ga. App. 756, 760 S.E.2d 708 (2014).

17-10-6.2. Punishment for sexual offenders.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013). For annual survey on criminal law, see 66 Mercer L. Rev. 37 (2014).

JUDICIAL DECISIONS

Intentional physical harm explained. — Term intentional physical harm as used in O.C.G.A. § 17-10-6.2(c)(1)(D) refers to conduct by the defendant involving the intentional infliction of physical pain or injury upon the victim and that, consequently, evidence that the underlying sexual offense involved offensive and unwanted touching of the victim did not, standing alone, create a presumption of intentional physical harm that precluded a defendant from satisfying the criteria for release under the statute. State v. Randle, 331 Ga. App. 1, 769 S.E.2d 724 (2015).

Release from registration requirements proper. — Trial court did not abuse the court's discretion in releasing the defendant from the sex offender registration requirements because under O.C.G.A. § 17-10-6.2(c)(1)(D) there was evidence that the underlying child molestation offense consisted of the defendant touching the genitals of the child victim with the defendant's hands, thus, the sexual offense did not rise to the level of intentional physical harm so as to preclude release from the registration requirements. State v. Randle, 331 Ga. App. 1, 769 S.E.2d 724 (2015).

First offender consideration not appropriate. — Because the defendant was not entitled to first offender treatment for the crimes of child molestation and enticing a child for indecent purposes, to which the defendant pled guilty, the defendant's

claims that trial counsel was deficient for misinforming the defendant about the defendant's eligibility for and failing to request first offender treatment were without merit. Harris v. State, 325 Ga. App. 568, 754 S.E.2d 148 (2014).

No application to attempted crimes. — With regard to the defendant's conviction for criminal attempt to commit child molestation and related crimes, the trial court did not err by refusing to follow the guidelines set forth in O.C.G.A. § 17-10-6.2 for sexual offenses because the statute only applied to completed crimes, not to attempted crimes. Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

17-10-7. Punishment of repeat offenders; punishment and eligibility for parole of persons convicted of fourth felony offense.

(a) Except as otherwise provided in subsection (b) or (b.1) of this Code section, any person who, after having been convicted of a felony offense in this state or having been convicted under the laws of any other state or of the United States of a crime which if committed within this state would be a felony and sentenced to confinement in a penal institution, commits a felony punishable by confinement in a penal institution shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted, provided that, unless otherwise provided by law, the trial judge may, in his or her discretion, probate or suspend the maximum sentence prescribed for the offense.

(b)(1) As used in this subsection, the term "serious violent felony" means a serious violent felony as defined in subsection (a) of Code Section 17-10-6.1.

(2) Except as provided in subsection (e) of Code Section 17-10-6.1, any person who has been convicted of a serious violent felony in this state or who has been convicted under the laws of any other state or of the United States of a crime which if committed in this state would be a serious violent felony and who after such first conviction subsequently commits and is convicted of a serious violent felony for which such person is not sentenced to death shall be sentenced to imprisonment for life without parole. Any such sentence of life without parole shall not be suspended, stayed, probated, deferred, or withheld, and any such person sentenced pursuant to this paragraph shall not be eligible for any form of pardon, parole, or early release administered by the State Board of Pardons and Paroles or for any earned time, early release, work release, leave, or any other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the sentence of life imprisonment without possibility of parole, except as may be authorized by any existing or future provisions of the Constitution.

(b.1) Subsections (a) and (c) of this Code section shall not apply to a second or any subsequent conviction for any violation of subsection (a), paragraph (1) of subsection (i), or subsection (j) of Code Section 16-13-30.

(c) Except as otherwise provided in subsection (b) or (b.1) of this Code section and subsection (b) of Code Section 42-9-45, any person who, after having been convicted under the laws of this state for three felonies or having been convicted under the laws of any other state or of the United States of three crimes which if committed within this state would be felonies, commits a felony within this state shall, upon conviction for such fourth offense or for subsequent offenses, serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served.

(d) For the purpose of this Code section, conviction of two or more crimes charged on separate counts of one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction.

(e) This Code section is supplemental to other provisions relating to recidivous offenders. (Laws 1833, Cobb's 1851 Digest, p. 840; Code 1863, § 4562; Code 1868, § 4582; Code 1873, § 4676; Code 1882, § 4676; Penal Code 1895, § 1042; Penal Code 1910, § 1068; Code 1933, § 27-2511; Ga. L. 1953, Nov.-Dec. Sess., p. 289, § 1; Ga. L. 1974, p. 352, § 5; Ga. L. 1983, p. 3, § 14; Ga. L. 1984, p. 760, § 2; Ga. L. 1994, p. 1959, § 12; Ga. L. 2010, p. 563, § 1/HB 901; Ga. L. 2012, p. 899, § 4-4/HB 1176; Ga. L. 2013, p. 222, § 10/HB 349; Ga. L. 2015, p. 519, § 2-1/HB 328.)

The 2015 amendment, effective May 5, 2015, inserted "and subsection (b) of Code Section 42-9-45" near the beginning of subsection (c).

Editor's notes. — Ga. L. 2015, p. 519, § 9-1/HB 328, not codified by the General Assembly, provides, in part, that: "The provisions of Part II of this Act shall be given retroactive effect to those sentences imposed before the effective date of Part II of this Act." The effective date of this Act is May 5, 2015.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration

Defendant properly sentenced as recidivist. — Defendant's challenge to the recidivist sentences failed because the certified copy of the defendant's prior burglary conviction showed that the defendant was sentenced to a term of probation to be served at a halfway house; it did not indicate, as the defendant claimed, that the sentence was entered pursuant to the First Offender Act, O.C.G.A. § 42-8-60. Robbins v. State, 326 Ga. App. 812, 757 S.E.2d 452 (2014).

Recidivist sentence was erroneous. — Trial court erred by sentencing the defendant as a recidivist because the defendant's one prior conviction could not serve as the basis for both the failure of a registered sex offender to report a change in residence count and the recidivist sentence. Pardon v. State, 322 Ga. App. 393, 745 S.E.2d 658 (2013).

Ineffective assistance for failing to challenge sufficiency of notice. — Defendant failed to show trial counsel's performance was deficient for failing to challenge the sufficiency of the state's notice of intent to seek punishment as a recidivist because there was no evidence in the record that the state failed to provide a copy of the criminal history report, nor was there any evidence that the defendant and counsel were unaware of the specific felony convictions listed in the criminal history record. Williams v. State, 326 Ga. App. 784, 757 S.E.2d 448 (2014).

No ineffective assistance of counsel for failure to object to admission of prior convictions.

Trial court did not abuse the court's discretion by denying the defendant's motion to withdraw the guilty plea because the defendant did not identify any specific prior guilty pleas that counsel should have objected to as improper considerations for recidivist sentencing. Phillips v. State, 329 Ga. App. 279, 764 S.E.2d 879 (2014).

Effect of recidivism on voluntariness of guilty plea.

State met the state's burden of showing that the defendant's plea was freely and voluntarily entered, that the defendant understood the nature of the charges, and that the defendant was aware of the consequences of a guilty plea because the possibility of a nonrecidivist sentence never was presented to or considered by the court; the defendant's response showed that the defendant understood that a nonrecidivist sentence was not a possibility; and trial counsel testified that the defendant and counsel had discussed what the term recidivism meant, and that counsel had explained to the defendant the difference between recidivist and nonrecidivist sentencing several times. Ranger v. State, 330 Ga. App. 578, 768 S.E.2d 768 (2015).

Discretion in imposition of sentence.

In a case in which the defendant was convicted of possession of cocaine with the intent to distribute, the trial court did not err in concluding that the court lacked the discretion to suspend or probate any portion of the defendant's mandatory ten-year minimum sentence because, at sentencing, the state presented evidence that the defendant had three prior felony convictions, including one for possession of cocaine with the intent to distribute; in such cases, the court of appeals had held that O.C.G.A. § 17-10-7(c) required the trial court to impose a mandatory minimum ten-year sentence, no part of which could be probated. Thomas v. State, 321 Ga. App. 214, 741 S.E.2d 298 (2013).

Ten-year sentence for shoplifting appropriate. — In applying the statute for imposition of recidivist sentencing, based on the defendant's four prior felony drug convictions, the trial court had no discretion with regard to the term of the sentence and was required to sentence the defendant to 10 years, which was the maximum sentence for theft by shoplifting. Allen v. State, 325 Ga. App. 752, 754 S.E.2d 795 (2014).

Cited in McCowan v. State, 325 Ga. App. 509, 753 S.E.2d 775 (2014); Williams v. State, 326 Ga. App. 784, 757 S.E.2d 448 (2014).

Allegation and Proof of Prior Convictions

Recidivism evidence used to enhance sentence.

Because the felony convictions not challenged by the defendant would have suf-

Allegation and Proof of Prior Convictions (Cont'd)

ficed to render the defendant a recidivist and because both of the defendant's attacks on prior convictions for drug possession with intent to distribute lacked merit, the trial court did not err when the court considered those prior convictions and sentenced the defendant to serve 30 years without parole under O.C.G.A. §§ 16-13-30(b) and 17-10-7(c). Merritt v. State, 329 Ga. App. 871, 766 S.E.2d 217 (2014).

Allegation and proof of prior convictions generally.

Trial court erred in sentencing the defendant as a recidivist under O.C.G.A. § 17-10-7 because the trial court did not admit into the record two certified copies of the defendant's prior convictions tendered by the state or a third copy that the prosecution had been waiting to receive from the clerk's office, and defense counsel did not waive the requirement that the convictions be proven by the state. Tanksley v. State, 323 Ga. App. 299, 743 S.E.2d 585 (2013).

Proof of validity of prior guilty plea.

Remand for further sentencing proceedings was necessary, because the state was not given an opportunity to show that a prior conviction, based on a guilty plea, upon which the state relied during sentencing was constitutional. Grant v. State, 326 Ga. App. 121, 756 S.E.2d 255 (2014).

Probation or Suspension

Sentencing when offenses merged. — Trial court vacated the conviction and sentence for voluntary manslaughter recognizing correctly that the voluntary manslaughter should have merged into the felony murder. The only sentence that survives is the sentence for murder, and the trial court never pronounced a sentence pursuant to O.C.G.A. § 17-10-7(c) for that crime, nor does the written sentencing order reflect that the defendant is parole ineligible. Grimes v. State, 293 Ga. 559, 748 S.E.2d 441 (2013).

17-10-9. Specification by judge imposing sentence of time from which penal sentence to run; effect of appeal.

JUDICIAL DECISIONS

Credit for time served.

Trial court erred in sentencing the defendant by specifying that the defendant's credit for time served would not begin until December 5, 2008, the date probation for another offense expired because a trial judge has no authority to interfere with the administrative duties of the correctional custodians and the Georgia Department of Corrections to determine and award credit for time served. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

17-10-9.1. Voluntary surrender to county jail or correctional institution; release of defendant.

(a) When a defendant who pleads nolo contendere or guilty or is convicted of an offense against the laws of this state other than:

(1) Treason;

(2) Murder;

(3) Rape;

(4) Aggravated sodomy;

(5) Armed robbery;

(5.1) Home invasion in any degree;

(6) Aircraft hijacking and hijacking of a motor vehicle;

(7) Aggravated child molestation;

(8) Manufacturing, distributing, delivering, dispensing, administering, selling, or possessing with intent to distribute any controlled substance classified under Code Section 16-13-25 as Schedule I or under Code Section 16-13-26 as Schedule II;

(9) Violating Code Section 16-13-31, relating to trafficking in cocaine or marijuana;

(10) Kidnapping, arson, or burglary in any degree if the person, at the time such person was charged, has previously been convicted of, was on probation or parole with respect to, or was on bail for kidnapping, arson, aggravated assault, burglary in any degree, or one or more of the offenses listed in paragraphs (1) through (9) of this subsection;

(11) Child molestation;

(12) Robbery;

(13) Aggravated assault; or

(14) Voluntary manslaughter

is sentenced to a term of confinement in a county jail or a correctional institution operated by or under the jurisdiction and supervision of the Department of Corrections, the sentencing judge may release the defendant pending the defendant's surrendering to a county jail or to a correctional institution designated by the Department of Corrections as authorized in this Code section. The sentencing court may release the defendant on bond or may release the defendant on the defendant's personal recognizance. This Code section shall not be construed to limit the court's authority in prescribing conditions of probation.

(b) Any defendant who has been released on bond and who has complied with all of the conditions of the bond and any other defendant who, in the opinion of the sentencing judge, is deemed worthy of the procedure to surrender voluntarily, may be eligible to participate in the program. However, the sentencing judge shall be the sole and final arbiter concerning eligibility and the defendant shall have no right to appeal such decision.

(c) When a defendant submits a request to the sentencing judge to be allowed to surrender voluntarily to a county jail or a correctional facility, the judge may consider the request and if, taking into the

consideration the crime for which the defendant is being sentenced, the history of the defendant, and any other factors which may aid in the decision, the judge determines that the granting of the request will pose no threat to society, the defendant shall be remanded to the supervision of a community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42 by the judge and ordered to surrender voluntarily to a county jail designated by the court or to a correctional institution as thereafter designated by the Department of Corrections. The surrender date shall be a date thereafter specified as provided in subsection (d) of this Code section. The sentence of any defendant who is released pursuant to this Code section shall not begin to run until such person surrenders to the facility designated by the court or by the department, provided that such person shall receive credit toward his or her sentence for time spent in confinement awaiting trial as provided in Code Section 17-10-11.

(d) In the event the defendant is ordered to surrender voluntarily to a county jail, the court shall designate the date on which the defendant shall surrender, which shall not be more than 120 days after the date of conviction. When the sentencing judge issues an order requiring a defendant to surrender voluntarily to a correctional institution, the Department of Corrections shall authorize the commitment and designate the correctional institution to which the defendant shall report and the date on which the defendant is to report, which date shall not be more than 120 days after the date of conviction. Upon such designation, the department shall notify the community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, as applicable, who shall notify the defendant accordingly. Subsistence and transportation expenses en route to the correctional institution shall be borne by the defendant.

(e) The provisions of this Code section shall not apply to any defendant convicted of a capital felony.

(f) If the defendant fails to surrender voluntarily as directed and required, the defendant may be charged with the offense of bail jumping pursuant to subsection (a) of Code Section 16-10-51 or the offense of escape pursuant to paragraph (3) of subsection (a) of Code Section 16-10-52 and, if convicted of such crimes, shall be punished as provided by law; or may be cited for contempt of court by the sentencing judge and, if convicted of contempt, the defendant shall be punished as provided in Code Section 15-6-8.

(g) The Department of Corrections is authorized and directed to promulgate such rules and regulations as may be necessary to effectuate the purposes of this Code section. (Code 1981, § 17-10-9.1, enacted

by Ga. L. 1989, p. 607, § 1; Ga. L. 1994, p. 1625, § 6; Ga. L. 2012, p. 899, § 8-10/HB 1176; Ga. L. 2014, p. 426, § 10/HB 770; Ga. L. 2015, p. 422, § 5-33/HB 310.)

The 2014 amendment, effective July 1, 2014, added paragraph (a)(5.1).

The 2015 amendment, effective July 1, 2015, in subsection (c), substituted "community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42" for "probation officer" near the end of the first sentence and substituted "shall receive credit toward his or her sentence" for "will receive credit toward his sentence" in the last sentence; and, in subsection (d), deleted "date" preceding "shall not be more" in the first sentence, and substituted "community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, as applicable," for "supervising probation officer" in the last sentence. See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

17-10-12. Affidavit specifying number of days spent in confinement; disposition of affidavit; granting of credit to defendant.

JUDICIAL DECISIONS

Judge has no authority to interfere with credit issued by administrative entities. — Trial court erred in sentencing the defendant by specifying that the defendant's credit for time served would not begin until December 5, 2008, the date probation for another offense expired because a trial judge has no authority to interfere with the administrative duties of the correctional custodians and the Georgia Department of Corrections to determine and award credit for time served. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

17-10-14. Committal of person under 17 convicted of felony.

(a) Notwithstanding any other provisions of this article and except as otherwise provided in subsection (b) of this Code section, in any case where a person under the age of 17 years is convicted of a felony and sentenced as an adult to life imprisonment or to a certain term of imprisonment, such person shall be committed to the Department of Juvenile Justice to serve such sentence in a detention center of such department until such person is 17 years of age at which time such person shall be transferred to the Department of Corrections to serve the remainder of the sentence. This Code section shall apply to any person convicted on or after July 1, 1987, and to any person convicted prior to such date who has not been committed to an institution operated by the Department of Corrections.

(b) If a child is transferred to superior court pursuant to Code Section 15-11-561 and convicted of aggravated assault as defined in Chapter 5 of Title 16, the court may sentence such child to the

Department of Corrections. Such child shall be housed in a designated youth confinement unit until such person is 17 years of age, at which time such person may be housed in any other unit designated by the Department of Corrections. (Code 1981, § 17-10-14, enacted by Ga. L. 1987, p. 1335, § 1; Ga. L. 1990, p. 1930, § 7; Ga. L. 1992, p. 1983, § 19; Ga. L. 1994, p. 1012, § 27; Ga. L. 1997, p. 1453, § 1; Ga. L. 2000, p. 20, § 8; Ga. L. 2013, p. 294, § 4-18/HB 242; Ga. L. 2015, p. 540, § 1-16/HB 361.)

The 2015 amendment, effective May 5, 2015, substituted "pursuant to" for "according to subsection (b) of" in the first sentence of subsection (b).

17-10-16.1. Seeking death penalty not prerequisite to life without parole sentence.

JUDICIAL DECISIONS

State was permitted to seek a sentence of life without parole since the murder occurred one year after the law was changed to permit such a sentence. Heywood v. State, 292 Ga. 771, 743 S.E.2d 12 (2013).

ARTICLE 2

DEATH PENALTY GENERALLY

Law reviews. — For article, "Death Penalty," see 66 Mercer L. Rev. 51 (2014).

17-10-30. Procedure for imposition of death penalty generally.

Law reviews. — For annual survey on death penalty, see 65 Mercer L. Rev. 93 (2013). For article, "Death Penalty," see 66 Mercer L. Rev. 51 (2014).

JUDICIAL DECISIONS

Analysis

General Consideration
Aggravating Circumstances
1. In General
3. Crime Committed While Engaged in Commission of Other Crimes
4. Outrageously or Wantonly Vile, Horrible, or Inhuman Circumstances

General Consideration

Cited in Humphrey v. Nance, 293 Ga. 189, 744 S.E.2d 706 (2013); Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738 (2013).

Aggravating Circumstances

1. In General

Evidence supported findings of aggravated circumstances.

Evidence was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the defendant's motive in murdering the victims was to avoid the defendant's own unlawful arrest as the evidence showed that the defendant failed to report to the defendant's probation officer, left the area after the murder, and had no intention of complying with the terms of probation. Hulett v. State, 296 Ga. 49, 766 S.E.2d 1 (2014).

3. Crime Committed While Engaged in Commission of Other Crimes

Death sentence upheld when each is supported by other circumstances.

Defendant's sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor because two statutory aggravating circumstances were found; namely, the murder was committed while engaged in the capital felony of kidnapping with bodily injury and while engaged in the offense of burglary, and an insufficiency of the evidence to support one or more statutory aggravating circumstances found by the jury did not require reversal if supported by at least one. Spears v. State, 296 Ga. 598, 769 S.E.2d 337 (2015).

4. Outrageously or Wantonly Vile, Horrible, or Inhuman Circumstances

Beating of victim before or after death would support depravity of mind. — In defendant's capital murder trial, counsel was not ineffective for failing to call a forensic pathologist to counter the state's pathologist's testimony that the victim was alive from a gunshot wound when the victim was severely beaten, which supported two aggravating circumstances for the death penalty under O.C.G.A. § 17-10-30(b)(2), and (b)(7), because even if the victim was dead when beaten, that evidence would have supported a finding of depravity of mind. Terrell v. GDCP Warden, 744 F.3d 1255 (11th Cir. 2014).

17-10-31. Requirement of jury finding of aggravating circumstance and recommendation of death penalty prior to imposition; arguments of counsel during sentencing phase; jury instructions; actions of judge in event of failure to reach unanimous verdict.

Law reviews. — For article, "Death Penalty," see 66 Mercer L. Rev. 51 (2014).

JUDICIAL DECISIONS

Death sentence upheld when each aggravating factor supported by other circumstances. — Defendant's sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor because two statutory aggravating circumstances were found; namely, the murder was committed while engaged in the capital felony of kidnapping with bodily injury and while engaged in the offense of burglary, and an insufficiency of the evidence to support one or more statutory aggravating circumstances found by the jury did not require reversal if supported by at least one. Spears v. State, 296 Ga. 598, 769 S.E.2d 337 (2015).

17-10-35. Review of death sentences by Supreme Court; forwarding of record and transcript; scope of review; written briefs and oral argument; similar cases to be included in decision; direct appeal to be consolidated with sentence review.

Law reviews. — For annual survey on death penalty, see 65 Mercer L. Rev. 93 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration
Factors Reviewed by Court
3. Excessive or Disproportionate Sentences

General Consideration

Evidence was sufficient to support death penalty.

Defendant's sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor because two statutory aggravating circumstances were found; namely, the murder was committed while engaged in the capital felony of kidnapping with bodily injury and while engaged in the offense of burglary, and an insufficiency of the evidence to support one or more statutory aggravating circumstances found by the jury did not require reversal if supported by at least one. Spears v. State, 296 Ga. 598, 769 S.E.2d 337 (2015).

Factors Reviewed by Court

3. Excessive or Disproportionate Sentences

Death sentences upheld.

Upon examination of the entire trial record, the Georgia Supreme Court concluded that the absence of the prosecuting attorney's violation of the Golden Rule, which was a marginal one whose impropriety was not obvious from prior case law, would not in reasonable probability have changed the jury's sentencing verdict. Spears v. State, 296 Ga. 598, 769 S.E.2d 337 (2015).

Death sentences imposed were not disproportionate punishment within the meaning of Georgia law. Hulett v. State, 296 Ga. 49, 766 S.E.2d 1 (2014).

17-10-40. Change of time period for execution when time period set for execution has passed; recordation on court minutes; length of and time limitation for new time period for execution; setting day and time for execution.

JUDICIAL DECISIONS

Disclosure of identifying information of persons and entitites involved in executions. — Georgia Supreme Court held that it is was not unconstitutional for the State of Georgia to maintain the confidentiality of the names and other

identifying information of the persons and entities involved in executions, pursuant to O.C.G.A. § 42-5-36(d), including those who manufacture the drug or drugs to be used. Owens v. Hill, 295 Ga. 302, 758 S.E.2d 794 (2014).

17-10-44. Apparatus, machinery, and appliances.

JUDICIAL DECISIONS

Disclosure of identifying information of persons and entities involved in executions. — Georgia Supreme Court held that it was not unconstitutional for the State of Georgia to maintain the confidentiality of the names and other identifying information of the persons and entities involved in executions, pursuant to O.C.G.A. § 42-5-36(d), including those who manufacture the drug or drugs to be used. Owens v. Hill, 295 Ga. 302, 758 S.E.2d 794 (2014).

CHAPTER 12

LEGAL DEFENSE FOR INDIGENTS

Article 1

Georgia Public Defender Council

Sec.

Article 2

Public Defenders

Article 3A

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Article 4

Verification of Indigency

ARTICLE 1

GEORGIA PUBLIC DEFENDER COUNCIL

17-12-1. Short title; Georgia Public Defender Council; responsibilities.

(a) This chapter shall be known and may be cited as the "Georgia Indigent Defense Act of 2003."

(b) The Georgia Public Defender Council shall be an independent agency within the executive branch of state government.

(c) The council shall be responsible for assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, to indigent persons who are entitled to representation under this chapter. (Code 1981, § 17-12-1, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2007, p. 65, § 1/SB 139; Ga. L. 2015, p. 519, § 7-1/HB 328.)

The 2015 amendment, effective July 1, 2015, substituted "Georgia Public Defender Council" for "Georgia Public Defender Standards Council" in subsection (b).

17-12-2. Definitions.

As used in this chapter, the term:

(1) "Assistant public defender" means an attorney who is employed by any circuit public defender.

(2) "Circuit public defender" means the head of a public defender office providing indigent defense representation within any given judicial circuit of this state.

(3) "Circuit public defender office" means the office of any of the several circuit public defenders.

(4) "Council" means the Georgia Public Defender Council.

(5) "Director" means the director of the Georgia Public Defender Council.

(6) "Indigent person" or "indigent defendant" means:

(A) A person charged with a misdemeanor, violation of probation, or a municipal or county offense punishable by imprisonment who earns less than 100 percent of the federal poverty guidelines unless there is evidence that the person has other resources that might reasonably be used to employ a lawyer without undue hardship on the person or his or her dependents;

(B) A juvenile charged with a delinquent act or a violation of probation punishable by detention whose parents earn less than 125 percent of the federal poverty guidelines unless there is evidence that the juvenile or his or her parents have other resources that might reasonably be used to employ a lawyer without undue hardship on the juvenile, his or her parents, or the parent's dependents; and

(C) A person charged with a felony who earns or, in the case of a juvenile, whose parents earn, less than 150 percent of the federal poverty guidelines unless there is evidence that the person has other resources that might reasonably be used to employ a lawyer without undue hardship on the person, his or her dependents, or, in the case of a juvenile, his or her parents or the parent's dependents.

In no case shall a person whose maximum income level exceeds 150 percent of the federal poverty level or, in the case of a juvenile, whose household income exceeds 150 percent of the federal poverty level be an indigent person or indigent defendant.

(7) "Legislative oversight committee" means the Legislative Oversight Committee for the Georgia Public Defender Council.

(8) "Public defender" means an attorney who is employed in a circuit public defender office or who represents an indigent person pursuant to this chapter. (Code 1981, § 17-12-2, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2006, p. 752, § 4/SB 503; Ga. L. 2008, p. 846, § 15/HB 1245; Ga. L. 2015, p. 519, § 7-2/HB 328.)

The 2015 amendment, effective July 1, 2015, substituted "Georgia Public Defender Council" for "Georgia Public Defender Standards Council" in paragraphs (4), (5), and (7).

17-12-3. Council created; membership.

(a) There is created the Georgia Public Defender Council to be composed of nine members. Other than county commission members, members of the council shall be individuals with significant experience working in the criminal justice system or who have demonstrated a strong commitment to the provision of adequate and effective representation of indigent defendants.

(b) Effective July 1, 2011, the council shall be reconstituted. The members serving on the council immediately prior to July 1, 2011, shall cease to serve on that date, but such prior members shall be eligible for reappointment to succeed themselves or to fill another position on the council.

(c) The nine members of the council shall be appointed as follows:

(1) Five members shall be appointed by the Governor. The Governor shall appoint three county commissioners who have been elected and are serving as members of a county governing authority in this state. The county commissioner councilmembers appointed by the Governor shall be from different geographic regions of this state. The Governor may solicit recommendations for such appointees from the Association County Commissioners of Georgia. Each county commissioner councilmember shall serve a term of four years; provided, however, that the initial appointments shall be for one, two, and three years, respectively, as designated by the Governor for each appointment, and thereafter, such members shall serve terms of four years. A county commission councilmember shall be eligible to serve so long as he or she retains the office by virtue of which he or she is serving on the council. The Governor shall appoint two other members to the council, one of whom shall be a circuit public defender, who shall serve terms of four years;

(2) Two members shall be appointed by the Lieutenant Governor and each shall serve terms of four years; provided, however, that the initial appointments shall be for one and four years, respectively, as designated by the Lieutenant Governor for each appointment, and thereafter, such members shall serve terms of four years; and

(3) Two members shall be appointed by the Speaker of the House of Representatives and each shall serve terms of four years; provided, however, that the initial appointments shall be for two and three years, respectively, as designated by the Speaker of the House of Representatives for each appointment, and thereafter, such members shall serve terms of four years.

(d) All initial terms shall begin on July 1, 2011, and their successors' terms shall begin on July 1 following their appointment. Any vacancy for a member shall be filled by the appointing authority, and such appointee shall serve the balance of the vacating member's unexpired term. Any member of the council may be appointed to successive terms.

(e) In making the appointments of members of the council who are not county commissioners, the appointing authorities shall seek to identify and appoint persons who represent a diversity of backgrounds and experience and may solicit suggestions from the State Bar of Georgia, local bar associations, the Georgia Association of Criminal Defense Lawyers, the councils representing the various categories of state court judges in Georgia, and the Prosecuting Attorneys' Council of the State of Georgia, as well as from the public and other interested organizations and individuals within this state. The appointing authorities may solicit recommendations for county commissioners from the Association County Commissioners of Georgia. The appointing authorities shall not appoint a prosecuting attorney as defined in paragraph

(6) of Code Section 19-13-51, any employee of a prosecuting attorney's office, or an employee of the Prosecuting Attorneys' Council of the State of Georgia to serve on the council. (Code 1981, § 17-12-3, enacted by Ga. L. 2011, p. 91, § 1/HB 238; Ga. L. 2015, p. 519, § 7-3/HB 328.)

The 2015 amendment, effective July 1, 2015, substituted "Georgia Public Defender Council" for "Georgia Public Defender Standards Council" in the first sentence of subsection (a); and substituted "may solicit" for "shall solicit" in the first sentence of subsection (e).

17-12-5. Director; qualifications; powers and responsibilities.

(a) To be eligible for appointment as the director, a candidate shall be a member in good standing of the State Bar of Georgia with at least seven years' experience in the practice of law. The director shall be appointed by the Governor and shall serve at the pleasure of the Governor.

(b)(1) The director shall work with and provide support services and programs for circuit public defender offices and other attorneys representing indigent persons in criminal or juvenile cases in order to improve the quality and effectiveness of legal representation of such persons and otherwise fulfill the purposes of this chapter. Such services and programs shall include, but shall not be limited to, technical, research, and administrative assistance; educational and training programs for attorneys, investigators, and other staff; assistance with the representation of indigent defendants with mental disabilities; assistance with the representation of juveniles; assistance with death penalty cases; and assistance with appellate advocacy.

(2) The director may establish divisions within the office to administer the services and programs as may be necessary to fulfill the purposes of this chapter. The director shall establish a mental health advocacy division and the Georgia capital defender division.

(3) The director may hire and supervise such staff employees and may contract with outside consultants on behalf of the office as may be necessary to provide the services contemplated by this chapter.

(c) The director shall have and may exercise the following power and authority:

(1) The power and authority to take or cause to be taken any or all action necessary to perform any duties, responsibilities, or functions which the director is authorized by law to perform and to exercise any power or authority which the council is authorized under subsection (a) of Code Section 17-12-4 to exercise; and

(2) The power and authority to assist the council in the performance of its duties, responsibilities, and functions and the exercise of its power and authority.

(d) The director shall:

(1) Prepare and submit to the council a proposed budget for the council. The director shall also prepare and submit an annual report containing pertinent data on the operations, costs, and needs of the council and such other information as the council may require;

(2) Develop such procedures as the director determines may be necessary to carry out the provisions of this chapter;

(3) Administer and coordinate the operations of the council;

(4) Maintain proper records of all financial transactions related to the operation of the council;

(5) At the director's discretion, solicit and accept on behalf of the council any funds that may become available from any source, including government, nonprofit, or private grants, gifts, or bequests;

(6) Coordinate the services of the council with any federal, county, or private programs established to provide assistance to indigent persons in cases subject to this chapter;

(7) Provide for the training of attorneys and other staff involved in the legal representation of persons subject to this chapter;

(8) Attend all council meetings, except those meetings or portions thereof that address the question of appointment or removal of the director;

(9) Ensure that the expenditures of the council are not greater than the amounts budgeted or available from other revenue sources;

(10) Hire or remove a mental health advocate who shall serve as director of the division of the office of mental health advocacy;

(11) Hire or remove the capital defender who shall serve as the director of the division of the office of the Georgia capital defender; and

(12) Evaluate each circuit public defender's job performance.

(e) The director shall not:

(1) Provide direct legal representation to any person entitled to services pursuant to this chapter; and

(2) Engage in the private practice of law for profit. (Code 1981, § 17-12-5, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, p. 631,

§ 17; Ga. L. 2008, p. 846, § 18/HB 1245; Ga. L. 2011, p. 91, § 3/HB 238; Ga. L. 2015, p. 519, § 7-4/HB 328.)

The 2015 amendment, effective July 1, 2015, deleted the former second sentence in subsection (a), which read: "The director shall be selected on the basis of training and experience and such other qualifications as the council deems appropriate."; in paragraph (c)(1), deleted "perform any indigent defense services or otherwise necessary to" following "necessary to" near the beginning and inserted "and" at the end; deleted former paragraph (c)(2), which read: "(2) The power and authority to enforce or otherwise require compliance with any and all rules, regulations, procedures, or directives necessary to perform any indigent defense services; to carry into effect the minimum standards and policies promulgated by the council; and to perform any duties, responsibilities, or functions which the council is authorized under subsection (a) of Code Section 17-12-4 to perform or to exercise; and"; redesignated former paragraph (c)(3) as present paragraph (c)(2); in paragraph (d)(2), substituted "such procedures as" for "such rules, procedures, and regulations as" near the beginning and deleted "and submit these to the council for approval and comply with all applicable laws, standards, and regulations" following "this chapter"; deleted "and supervise compliance with policies and standards adopted by the council" following "the council" in paragraph (d)(3); deleted "and consult with professional bodies concerning the implementation and improvement of programs for providing indigent services" following "the council" in paragraph (d)(6); inserted "or remove" in paragraphs (d)(10) and (d)(11); and added subsection (e).

17-12-6. Assistance of council to public defenders.

(a) The council may assist the public defenders throughout the state in their efforts to provide adequate legal defense to the indigent. Assistance may include:

(1) The preparation and distribution of a basic defense manual and other educational materials;

(2) The preparation and distribution of model forms and documents employed in indigent defense;

(3) The promotion of and assistance in the training of indigent defense attorneys;

(4) The provision of legal research assistance to public defenders; and

(5) The provision of such other assistance to public defenders as may be authorized by law.

(b) The council:

(1) Shall be the fiscal officer for the circuit public defender offices and shall account for all moneys received from each governing authority; and

(2) May collect, maintain, review, and publish in print or electronically records and statistics for the purpose of evaluating the delivery

of indigent defense representation in Georgia. (Code 1981, § 17-12-6, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2008, p. 846, § 19/HB 1245; Ga. L. 2010, p. 838, § 10/SB 388; Ga. L. 2015, p. 519, § 7-5/HB 328.)

The 2015 amendment, effective July 1, 2015, substituted "may assist" for "shall assist" in the introductory language of subsection (a); and substituted "May collect" for "Shall collect" in paragraph (b)(2).

17-12-7. Councilmembers; responsibilities; voting; removal; quorum; meetings; officers; expenses.

(a) All members of the council shall at all times act in the best interest of indigent defendants who are receiving legal representation under the provisions of this chapter.

(b) All members of the council shall be entitled to vote on any matter coming before the council unless otherwise provided by law or by rules adopted by the council concerning conflicts of interest.

(c) Each member of the council shall serve until a successor has been appointed. Removal of councilmembers shall be for cause and shall be in accordance with policies and procedures adopted by the council.

(d) Unless otherwise provided in this article, a quorum shall be a majority of the members of the council who are then in office, and decisions of the council shall be by majority vote of the members present, except that a majority of the entire council shall be required to approve the appointment of the chairperson and for annual approval of an alternative delivery system pursuant to Code Section 17-12-36 and other matters as set forth in Code Section 17-12-36. The vote of two-thirds of the members of the entire council shall be required to remove the chairperson of the council or to overturn the director's decision regarding the removal of a circuit public defender.

(e) The council shall meet at least semiannually and at such other times and places as it deems necessary or convenient for the performance of its duties.

(f) The council shall elect a chairperson and such officers from the members of the council as it deems necessary and shall adopt such rules for the transaction of its business as it desires. The chairperson and officers shall serve for a term of two years and may be removed without cause by a vote of two-thirds of the members of the entire council and for cause by a majority vote of the entire council. The chairperson shall retain a vote on all matters except those in which the chairperson has a conflict of interest or the removal of the chairperson for cause. The council shall keep and maintain minutes of all council meetings.

(g) The members of the council shall receive no compensation for their services but shall be reimbursed for their actual expenses in-

curred in the performance of their duties as members of the council. Any expenses incurred by the council shall be paid from the general operating budget of the council. (Code 1981, § 17-12-7, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2011, p. 91, § 4/HB 238; Ga. L. 2014, p. 866, § 17/SB 340; Ga. L. 2015, p. 519, § 7-6/HB 328.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, revised language in subsection (c).

The 2015 amendment, effective July 1, 2015, substituted "semiannually" for "quarterly" in subsection (e).

17-12-8. Approval by council of programs for representation of indigents; public access to policies and standards.

Reserved. Repealed by Ga. L. 2015, p. 519, § 7-7/HB 328, effective July 1, 2015.

Editor's notes. — This Code section was based on Code 1981, § 17-12-8, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2005, p. ES3, § 12/HB 1EX; Ga. L. 2005, p. 60, § 17/HB 95; Ga. L. 2005, p. 910, § 1/HB 366; Ga. L. 2006, p. 752, § 6/SB 503; Ga. L. 2008, p. 846, § 20/HB 1245; Ga. L. 2011, p. 91, § 5/HB 238.

17-12-10. Annual reporting.

(a) Upon request, the council shall prepare annually a report of its activities in order to provide the General Assembly, the Governor, and the Supreme Court of Georgia with an accurate description and accounting of the preceding year's expenditures and revenue, including moneys received from cities and county governing authorities.

(b) Upon request, the council shall provide to the General Assembly, the Governor, and the Supreme Court of Georgia a detailed analysis of all grants and funds, whether public or private, applied for or granted, together with how and in what manner the same are to be utilized and expended.

(c) Upon request, the director shall prepare annually a report in order to provide the General Assembly, the Supreme Court, and the Governor with information on the council's assessment of the delivery of indigent defense services, including, but not limited to, the costs involved in operating each program and each governing authority's indigent person verification system, methodology used, costs expended, and savings realized. (Code 1981, § 17-12-10, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2008, p. 846, § 22/HB 1245; Ga. L. 2011, p. 91, § 7/HB 238; Ga. L. 2015, p. 519, § 7-8/HB 328.)

The 2015 amendment, effective July 1, 2015, substituted "Upon request, the council" for "The council" in subsections (a) and (b); substituted "Upon request, the director" for "The director" at the beginning of subsection (c); and deleted the former last sentence of subsection (a), which read: "Such report shall include a

three-year cost projection and anticipated revenues for all programs defined in the General Appropriations Act."

17-12-10.1. Legislative oversight committee created; membership; audits.

(a) There is created the Legislative Oversight Committee for the Georgia Public Defender Council which shall be composed of eight persons: three members of the House of Representatives appointed by the Speaker of the House of Representatives, three members of the Senate appointed by the Senate Committee on Assignments or such person or entity as established by Senate rule, and one member of the House of Representatives and one member of the Senate appointed by the Governor. The members of such committee shall be selected within ten days after the convening of the General Assembly in each odd-numbered year and shall serve until their successors are appointed.

(b) The Speaker of the House of Representatives shall appoint a member of such committee to serve as chairperson, and the Senate Committee on Assignments or such person or entity as established by Senate rule shall appoint one member of the committee to serve as vice chairperson during each even-numbered year. The Senate Committee on Assignments or such person or entity as established by Senate rule shall appoint a member of such committee to serve as chairperson, and the Speaker of the House of Representatives shall appoint one member to serve as vice chairperson during each odd-numbered year. Such committee shall meet at least once each year and, upon the call of the chairperson, at such additional times as deemed necessary by the chairperson.

(c) It shall be the duty of such committee to review and evaluate:

(1) Information on new programs submitted by the council;

(2) Information on policies proposed by the council;

(3) The strategic plans for the council;

(4) Program evaluation reports and budget recommendations of the council;

(5) The fiscal impact of fees and fines on counties;

(6) The reports submitted pursuant to Code Section 15-21A-7 in order to identify, among other things, opportunities to reduce or consolidate fees, fines, and surcharges; and

(7) Such other information or reports as deemed necessary by such committee.

(d) The council and director shall cooperate with such committee and provide such information or reports as requested by the committee for the performance of its functions.

(e) The council shall submit its budget estimate to the director of the Office of Planning and Budget in accordance with subsection (a) of Code Section 45-12-78.

(f) The members of such committee shall receive the allowances authorized for legislative members of legislative committees. The funds necessary to pay such allowances shall come from funds appropriated to the House of Representatives and the Senate.

(g) The legislative oversight committee shall be authorized to request that a performance audit of the council be conducted. (Code 1981, § 17-12-10.1, enacted by Ga. L. 2005, p. ES3, § 13/HB 1EX; Ga. L. 2007, p. 65, § 2/SB 139; Ga. L. 2008, p. 846, § 23/HB 1245; Ga. L. 2011, p. 91, § 8/HB 238; Ga. L. 2015, p. 519, § 7-9/HB 328.)

The 2015 amendment, effective July 1, 2015, substituted "Georgia Public Defender Council" for "Georgia Public Defender Standards Council" in the first sentence of subsection (a); substituted "once each year" for "three times each year" in the last sentence of subsection (b); substituted "on policies proposed" for "on rules, regulations, policies, and standards proposed" in paragraph (c)(2); deleted former subsection (f), which read: "(f) The legislative oversight committee shall make an annual report of its activities and findings to the membership of the General Assembly, the Chief Justice of the Supreme Court, and the Governor within one week of the convening of each regular session of the General Assembly. The chairperson of such committee shall deliver written executive summaries of such report to the members of the General Assembly prior to the adoption of the General Appropriations Act each year."; and redesignated former subsections (g) and (h) as present subsections (f) and (g), respectively.

ARTICLE 2

PUBLIC DEFENDERS

17-12-20. Public defender selection panel for each circuit; appointment of public defender; removal; vacancies.

(a) On and after July 1, 2011, there is created in each judicial circuit in this state a circuit public defender supervisory panel to be composed of three members, all of whom shall be attorneys who regularly practice in that particular judicial circuit. The chief judge of the superior court of the circuit shall appoint one member. The Governor shall appoint one member. In a single county judicial circuit, the chairperson of the governing authority or sole commissioner shall appoint one member; in multicounty judicial circuits, the chairpersons of the governing authorities or sole commissioners shall caucus and appoint one member. When a caucus is needed to appoint a member of the supervisory panel, the chairperson or sole commissioner of the largest county by population in

the judicial circuit shall convene the caucus. Members of the circuit public defender supervisory panel shall be individuals with significant experience working in the criminal justice system or who have demonstrated a strong commitment to the provision of adequate and effective representation of indigent defendants. A prosecuting attorney as defined in paragraph (6) of Code Section 19-13-51, any employee of a prosecuting attorney's office, or an employee of the Prosecuting Attorneys' Council of the State of Georgia shall not serve as a member of the circuit public defender supervisory panel after July 1, 2005. On and after July 1, 2008, no employees of the council shall serve as a member of the circuit public defender supervisory panel. Members of the circuit public defender supervisory panel shall reside in the judicial circuit in which they serve. The circuit public defender supervisory panel members shall serve for a term of five years. Any vacancy for an appointed member shall be filled by the appointing authority within 60 days of the vacancy occurring.

(b)(1) By majority vote of its membership, the circuit public defender supervisory panel shall annually elect a chairperson and secretary. The chairperson shall conduct the meetings and deliberations of the panel and direct all activities. The secretary shall keep accurate records of all the meetings and deliberations and perform such other duties as the chairperson may direct. The panel may be called into session upon the direction of the chairperson or by the council.

(2) By majority vote of its membership, the circuit public defender supervisory panel shall nominate not more than five people to serve as the circuit public defender in the circuit. The director shall select the circuit public defender from the panel's list of nominees. A circuit public defender shall serve a term for up to four years and may be appointed for successive terms but shall not be reappointed if he or she was removed pursuant to subsection (c) of this Code section.

(c) A circuit public defender may be removed for cause by the director. If a circuit public defender wants to appeal such removal, he or she may appeal the decision to the council. By a vote of two-thirds of the members of the entire council, the council may overturn the director's decision. Any appeal regarding a removal request shall be submitted to the council within 15 days of the effective date of the removal, and the council shall take action in hearing the appeal at its next regularly scheduled meeting and take final action within 30 days thereafter. A circuit public defender who has been removed by the director who has filed an appeal with the council shall continue to serve as the circuit public defender until the council reaches a decision on the appeal.

(d) A circuit public defender supervisory panel may convene at any time during its circuit public defender's term of office and shall convene at least annually for purposes of reviewing the circuit public defender's

job performance and the performance of the circuit public defender office. The director and circuit public defender shall be notified at least two weeks in advance of the convening of the circuit public defender supervisory panel. The circuit public defender shall be given the opportunity to appear before the circuit public defender supervisory panel and present evidence and testimony. The chairperson shall determine the agenda for the annual review process, but, at a minimum, such review shall include usage of state and local funding, expenditures, and budgeting matters. The chairperson shall make an annual report on or before the thirtieth day of September of each year concerning the circuit public defender supervisory panel's findings regarding the job performance of the circuit public defender and his or her office to the director on a form provided to the panel by the director. If at any time the circuit public defender supervisory panel finds that the circuit public defender is performing in a less than satisfactory manner or finds information of specific misconduct, the circuit public defender supervisory panel may by majority vote of its members adopt a resolution seeking review of its findings and remonstrative action by the director. Such resolution shall specify the reason for such request. All evidence presented and the findings of the circuit public defender supervisory panel shall be forwarded to the director within 15 days of the adoption of the resolution. The director shall initiate action on the circuit public defender supervisory panel's resolution within 30 days of receiving the resolution. The director shall notify the circuit public defender supervisory panel, in writing, of any actions taken pursuant to submission of a resolution under this subsection.

(e) If a vacancy occurs for the position of circuit public defender, the director shall appoint an interim circuit public defender to serve until the director has appointed a replacement. Within 30 days of the vacancy occurring, the circuit public defender supervisory panel shall meet and nominate not more than five people to serve as a replacement circuit public defender. The director shall select the replacement circuit public defender from the panel's list of nominees. (Code 1981, § 17-12-20, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2004, p. 631, § 17; Ga. L. 2005, p. ES3, § 17/HB 1EX; Ga. L. 2008, p. 846, § 28/HB 1245; Ga. L. 2011, p. 91, § 10/HB 238; Ga. L. 2013, p. 141, § 17/HB 79; Ga. L. 2015, p. 519, § 7-10/HB 328.)

The 2015 amendment, effective July 1, 2015, deleted "information collected pursuant to subsection (c) of Code Section 17-12-24," following "review shall include" in the fourth sentence in subsection (d).

17-12-25. (For effective date, see note) Salary of public defender; private practice prohibited.

(a) (For effective date, see note) Each circuit public defender shall receive an annual salary of $99,526.00, and cost-of-living adjustments may be given by the General Assembly in the General Appropriations Act by a percentage not to exceed the average percentage of the general increase in salary as may from time to time be granted to employees of the executive, judicial, and legislative branches of government; provided, however, that any increase for such circuit public defender shall not include within-grade step increases for which classified employees as defined by Code Section 45-20-2 are eligible. Any increase granted pursuant to this subsection shall become effective at the same time that funds are made available for the increase for such employees. The Office of Planning and Budget shall calculate the average percentage increase. Each circuit public defender may also be entitled to an accountability court salary supplement as set forth in Code Section 17-12-25.1.

(b) The county or counties comprising the judicial circuit may supplement the salary of the circuit public defender in an amount as is or may be authorized by local Act or in an amount as may be determined by the governing authority of the county or counties, whichever is greater.

(c) No circuit public defender shall engage in the private practice of law for profit or serve concurrently in any judicial office. (Code 1981, § 17-12-25, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2005, p. ES3, § 18/HB 1EX; Ga. L. 2008, p. 846, § 32/HB 1245; Ga. L. 2009, p. 745, § 1/SB 97; Ga. L. 2012, p. 446, § 2-18/HB 642; Ga. L. 2015, p. 919, § 1-7/HB 279.)

Delayed effective date. — Subsection (a), as set out above, becomes effective January 1, 2016. For version of subsection (a) in effective until January 1, 2016, see the 2015 amendment note.

The 2015 amendment, in subsection (a), substituted "$99,526.00" for "$87,593.58" near the beginning of the first sentence and added the last sentence. See editor's note for effective date.

Editor's notes. — Ga. L. 2015, p. 919, § 4-1(b), not codified by the General Assembly, provides that: "(b)(1) Part I of this Act shall become effective only if funds are appropriated for purposes of Part I of this Act in an appropriations Act enacted at the 2015 regular session of the General Assembly.

"(2) If funds are so appropriated, then Part I of this Act shall become effective on July 1, 2015, for purposes of making the initial appointments of the Court of Appeals Judges created by Part I of this Act, and for all other purposes, Part I of this Act shall become effective on January 1, 2016.

"(3) If funds are not so appropriated, then Part I of this Act shall not become effective and shall stand repealed on July 1, 2015."

Funds were appropriated at the 2015 session of the General Assembly.

17-12-25.1. (Effective January 1, 2016) Accountability court supplement.

(a) Whenever a circuit has implemented a drug court division, mental health court division, or veterans court division, then on and after January 1, 2016, the state shall pay the circuit public defender in such circuit an annual accountability court supplement of $6,000.00. Such supplement shall be paid from state funds by the Georgia Public Defender Standards Council in equal monthly installments as regular compensation.

(b) Notwithstanding Code Sections 17-12-27 and 17-12-28, the accountability court salary supplement paid pursuant to this Code section shall not be included in any calculation of compensation paid to assistant circuit public defenders or investigators that is measured as a percentage of a circuit public defender's salary.

(c) When a local law provides for a salary to be paid based on a percentage of, total compensation for, or similar mathematical relationship to a circuit public defender's salary, the accountability court salary supplement paid pursuant to this Code section shall not be included in the calculation of compensation to be paid by a county, municipality, or consolidated government.

(d) Notwithstanding subsection (b) of Code Section 17-12-25 and Code Section 17-12-30, on and after January 1, 2016, no county or counties comprising the circuit shall increase an aggregate county salary supplement paid to the circuit public defender or a state-paid position appointed pursuant to this article, if such supplement is $50,000.00 or more. (Code 1981, § 17-12-25.1, enacted by Ga. L. 2015, p. 919, § 1-8/HB 279.)

Delayed effective date. — This Code section becomes effective January 1, 2016.

Editor's notes. — Ga. L. 2015, p. 919, § 4-1(b)(1) and (2)/HB 279, not codified by the General Assembly, provides: "(b)(1) Part I of this Act shall become effective only if funds are appropriated for purposes of Part I of this Act in an appropriations Act enacted at the 2015 regular session of the General Assembly.

"(2) If funds are so appropriated, then Part I of this Act shall become effective on July 1, 2015, for purposes of making the initial appointments of the Court of Appeals Judges created by Part I of this Act, and for all other purposes, Part I of this Act shall become effective on January 1, 2016." Funds were appropriated at the 2015 session of the General Assembly.

17-12-36. Alternative delivery system; annual review of operations by council; record keeping.

(a) The council may permit a judicial circuit composed of a single county to continue in effect an alternative delivery system to the one set forth in this article if:

(1) The delivery system:

(A) Has a full-time director and staff and had been fully operational for at least two years on July 1, 2003; or

(B) Is administered by the county administrative office of the courts or the office of the court administrator of the superior court and had been fully operational for at least two years on July 1, 2003;

(2) The council, by majority vote of the entire council, determines that the delivery system meets or exceeds its policies as the council adopts;

(3) The governing authority of the county comprising the judicial circuit enacts a resolution expressing its desire to continue its delivery system and transmits a copy of such resolution to the council not later than September 30, 2004; and

(4) The governing authority of the county comprising the judicial circuit enacts a resolution agreeing to fully fund its delivery system.

(b) A judicial circuit composed of a single county may request an alternative delivery system only one time; provided, however, that if such judicial circuit's request for an alternative delivery system was disapproved on or before December 31, 2004, such judicial circuit may make one further request on or before September 1, 2005. The council shall allow such judicial circuit to have a hearing on such judicial circuit's request.

(c) The council shall make a determination with regard to continuation of an alternative delivery system not later than December 1, 2005, and if the council determines that such judicial circuit's alternative delivery system does not meet the requirements as established by the council, the council shall notify such judicial circuit of its deficiencies in writing and shall allow such judicial circuit an opportunity to cure such deficiencies. The council shall make a final determination with regard to continuation of an alternative delivery system on or before December 31, 2005. Initial and subsequent approvals of alternative delivery systems shall be by a majority vote of the entire council.

(d) Any circuit whose alternative delivery system is disapproved at any time shall be governed by the provisions of this article other than this Code section.

(e) In the event an alternative delivery system is approved, the council shall annually review the operation of such system and determine whether such system is meeting the requirements as established by the council and is eligible to continue operating as an approved alternative delivery system. In the event the council determines that

such system is not meeting the requirements as established by the council, the council shall provide written notice to such system of the deficiencies and shall provide such system an opportunity to cure such deficiencies.

(f) In the event an alternative delivery system is approved, it shall keep and maintain appropriate records, which shall include the number of persons represented; the offenses charged; the outcome of each case; the expenditures made in providing services; and any other information requested by the council.

(g) In the event the council disapproves an alternative delivery system either in its initial application or annual review, such system may appeal such decision to the council under such rules and procedures as shall be prescribed by the council.

(h) An approved alternative delivery system shall be paid by the council, from funds available to the council, in an amount equal to the amount that would have been allocated to the judicial circuit for the minimum salary of the circuit public defender, the assistant circuit public defenders, the investigator, and the administrative staff, exclusive of benefits, if the judicial circuit was not operating an alternative delivery system. (Code 1981, § 17-12-36, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2005, p. ES3, § 24/HB 1EX; Ga. L. 2005, p. 910, § 2/HB 366; Ga. L. 2008, p. 846, §§ 37, 38/HB 1245; Ga. L. 2011, p. 91, § 14/HB 238; Ga. L. 2015, p. 519, § 7-11/HB 328.)

The 2015 amendment, effective July 1, 2015, deleted "and standards, including, without limitation, caseload standards," following "exceeds its policies" in paragraph (a)(2); substituted "requirements as established" for "standards as established" in the first sentence in subsection (c) and the first and second sentences in subsection (e); and, in subsection (g), substituted "to the council" for "to the Supreme Court of Georgia" and substituted "by the council" for "by the Supreme Court".

ARTICLE 3A

RECOVERY OF ATTORNEY'S FEES AND COSTS

17-12-51. Repayment of attorney's fees as condition of probation.

(a) When a defendant who is represented by a public defender, who is paid in part or in whole by a county, enters a plea of nolo contendere, first offender, or guilty or is otherwise convicted, the court may impose as a condition of probation repayment of all or a portion of the cost for providing legal representation and other expenses of the defense if the payment does not impose a financial hardship upon the defendant or the defendant's dependent or dependents. The defendant shall make the payment through the community supervision officer to the county.

(b) When a defendant who is represented by a public defender, who is paid in part or in whole by a municipality, enters a plea of nolo contendere, first offender, or guilty or is otherwise convicted, the court may impose as a condition of probation repayment of all or a portion of the cost for providing legal representation and other expenses of the defense if the payment does not impose a financial hardship upon the defendant or the defendant's dependent or dependents. The defendant shall make the payment through the community supervision officer to the municipality.

(c) If a defendant who is represented by a public defender, who is paid for entirely by the state, enters a plea of nolo contendere, first offender, or guilty or is otherwise convicted, the court may impose as a condition of probation repayment of all or a portion of the cost for providing legal representation and other costs of the defense if the payment does not impose a financial hardship upon such defendant or such defendant's dependent or dependents. Such defendant shall make such payment through the community supervision officer to the Georgia Public Defender Council for payment to the general fund of the state treasury.

(d) In determining whether or not a payment imposed under this Code section imposes a financial hardship upon a defendant or defendant's dependent or dependents and in determining the amount of the payment to impose, the court shall consider the factors set forth in Code Section 17-14-10. The public defender may provide the court with an estimate of the cost for providing to the defendant the legal representation and other expenses of the defense. If requested by the defendant, the court shall hold a hearing to determine the amount to be paid.

(e) This Code section shall not apply to a disposition involving a child pursuant to Chapter 11 of Title 15, relating to juvenile proceedings. (Code 1981, § 17-12-51, enacted by Ga. L. 2006, p. 710, § 6/SB 203; Ga. L. 2008, p. 846, § 40/HB 1245; Ga. L. 2015, p. 422, § 5-34/HB 310; Ga. L. 2015, p. 519, § 7-12/HB 328.)

The 2015 amendments. — The first 2015 amendment, effective July 1, 2015, substituted "community supervision officer" for "probation department" in the last sentence in subsections (a) through (c). See editor's note for applicability. The second 2015 amendment, effective July 1, 2015, substituted "Georgia Public Defender Council" for "Georgia Public Defender Standards Council" in the last sentence in subsection (c).

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

ARTICLE 4

VERIFICATION OF INDIGENCY

17-12-80. Verification of indigency required; procedure; timing of notification of eligibility.

(a) In order to retain funding as provided in Code Sections 15-21-74 and 15-21A-6, a governing authority shall verify that the applicant qualifies as an indigent person. The governing authority shall establish the methodology for verification and fund such process. The governing authority shall produce auditable information to the council to substantiate its verification process as requested by the council or its director.

(b) The council shall establish policies to determine approval of an indigent person verification system and shall annually provide written notification to the Georgia Superior Court Clerks' Cooperative Authority as to whether or not a governing authority has an approved indigent person verification system.

(c) The governing authority shall advise the circuit public defender, if applicable, or the administrator of the indigent defense system for the jurisdiction of the name of each person who has applied for legal services and provide identifying information for those persons who are financially eligible for services within one business day of such person's application for services. (Code 1981, § 17-12-80, enacted by Ga. L. 2008, p. 846, § 41/HB 1245; Ga. L. 2011, p. 91, § 15/HB 238; Ga. L. 2015, p. 519, § 7-13/HB 328.)

The 2015 amendment, effective July 1, 2015, deleted "and standards" following "establish policies" in subsection (b).

CHAPTER 14

RESTITUTION AND DISTRIBUTION OF PROFITS TO VICTIMS OF CRIMES

Article 1

Restitution

ARTICLE 1

RESTITUTION

17-14-2. Definitions.

As used in this article, the term:

(1) "Conviction" means an adjudication of guilt of or a plea of guilty or nolo contendere to the commission of an offense against the laws of this state. Such term includes any such conviction or plea, notwithstanding the fact that sentence was imposed pursuant to Article 3 of Chapter 8 of Title 42. Such term also includes the adjudication or plea of a juvenile to the commission of an act which, if committed by an adult, would constitute a crime under the laws of this state.

(2) "Damages" means all special damages which a victim could recover against an offender in a civil action, including a wrongful death action, based on the same act or acts for which the offender is sentenced, except punitive damages and damages for pain and suffering, mental anguish, or loss of consortium. Such special damages shall not be limited by any law which may cap economic damages. Special damages may include the reasonably determined costs of transportation to and from court proceedings related to the prosecution of the crime.

(3) "Offender" means any natural person, firm, partnership, association, public or private corporation, or other legal entity that has been sentenced for any crime or any juvenile who has been adjudged delinquent.

(4) "Ordering authority" means:

(A) A court of competent jurisdiction;

(B) The State Board of Pardons and Paroles;

(C) The Department of Corrections;

(D) The Department of Juvenile Justice;

(E) The Department of Community Supervision; or

(F) Any combination thereof, as is required by the context.

(5) "Parent" means a person who is the legal mother as defined in Code Section 15-11-2, the legal father as defined in Code Section 15-11-2, or the legal guardian. Such term shall not include a foster parent.

(6) "Relief" means any parole or other conditional release from incarceration; the awarding of earned time allowances; reduction in security status; or placement in prison rehabilitation programs, including, but not limited to, those in which the offender receives monetary compensation.

(7) "Restitution" means any property, lump sum, or periodic payment ordered to be made by any offender or other person to any victim by any ordering authority. Where the victim is a public corporation or governmental entity or where the offender is a juvenile, restitution may also be in the form of services ordered to be performed by the offender.

(8) "Restitution order" means any order, decree, or judgment of an ordering authority which requires an offender to make restitution.

(9) "Victim" means any:

(A) Natural person or his or her personal representative or, if the victim is deceased, his or her estate; or

(B) Any firm, partnership, association, public or private corporation, or governmental entity

suffering damages caused by an offender's unlawful act; provided, however, that the term "victim" shall not include any person who is concerned in the commission of such unlawful act as defined in Code Section 16-2-20. (Code 1933, § 27-3002, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 2005, p. 88, § 5/HB 172; Ga. L. 2013, p. 294, § 4-19/HB 242; Ga. L. 2015, p. 422, § 5-35/HB 310.)

The 2015 amendment, effective July 1, 2015, in paragraph (4), deleted "or" at the end of subparagraph (4)(D), redesignated former subparagraph (4)(E) as present paragraph (4)(F), and added paragraph (4)(E). See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

JUDICIAL DECISIONS

Restitution is limited by thefts during time period alleged in accusation. — Trial court erred in ordering restitution for $260,637 for thefts from defendant's employer over a 12-year period because the accusation covered only a two-year period during which $57,000 was taken; under O.C.G.A. §§ 17-14-2(2) and 17-14-10, restitution was limited to damages which the victim could recover in a civil action, based on the same act. Vaughn v. State, 324 Ga. App. 289, 750 S.E.2d 375 (2013).

Cited in Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

17-14-3. Requirement of restitution by offender as condition of relief generally.

JUDICIAL DECISIONS

Finding of defendant's ability to pay. — Following the defendant's guilty plea to O.C.G.A. § 16-14-4(a) (RICO), an order of $725,000 restitution pursuant to O.C.G.A. § 17-14-3(a) was supported by evidence that the defendant had the capacity for gainful employment, notwithstanding the defendant's claim that the defendant was disabled; that the defendant had possessed hundreds of thousands of dollars of the victims' money; and that the defendant had a venture in which the defendant claimed $4.8 million. Nelson v. State, 329 Ga. App. 300, 764 S.E.2d 883 (2014).

17-14-6. Setoff of prior total or partial restitution made to victim; reduction of award from the Crime Victims Compensation Board by the amount of restitution; payment of restitution to governmental entities that have compensated the victim.

JUDICIAL DECISIONS

Reduction not authorized by codefendant's payment when victims not made whole. — Defendant was not entitled to a reduction in the amount of restitution the defendant owed by the $5,300 the codefendant paid in restitution under O.C.G.A. § 17-14-6 because together the parties were only ordered to pay $30,000, and the evidence showed the defendants stole $43,000 from the victims. Polly v. State, 323 Ga. App. 893, 748 S.E.2d 696 (2013).

Restitution award not supported by evidence. — Trial court erred in ordering the defendant to pay restitution in the amount of $7,584.35 to the Crime Victim Compensation Program and $1,000 in token restitution to the victim because the record contained no evidence to support the awards as the state presented no evidence supporting the court's request for $7,584.35, and the record did not show that the trial court considered the factors outlined in O.C.G.A. § 17-14-10(a) before requiring restitution as a condition of probation. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

17-14-7. Right of offender to offer restitution plan to ordering authority; consideration and adoption of plan; hearing to determine restitution; burden of proof; liability among multiple offenders; payment for multiple victims; waiver of victim's rights.

JUDICIAL DECISIONS

Restitution order proper.

Order of restitution was upheld as the testimony of the victim, an IT professional, as to the value of the stolen computer equipment was reasonable and, while the victim's valuation of the non-computer related items was less clear, the victim's testimony allowed the trial court to find that the victim's valuations of those items were based on eBay prices for used items. Although the evidence was insufficient to support an award for the value of the victim's hand tools and jar of coins, the fair market value of the other

non-computer items was sufficient to support the restitution award. Galimore v. State, 321 Ga. App. 886, 743 S.E.2d 545 (2013).

Cited in Nelson v. State, 329 Ga. App. 300, 764 S.E.2d 883 (2014).

17-14-8. Apportionment of payments for fines and restitution; payment to victims.

(a) In any case in which a court sentences an offender to pay restitution and a fine, if the court permits the offender to pay such restitution and fine in other than a lump sum, the clerk of any superior court of this state, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, or other official who receives such partial payments shall apply not less than one-half of each payment to the restitution before paying any portion of such fine or any forfeitures, costs, fees, or surcharges provided for by law to any agency, department, commission, committee, authority, board, or bureau of state or local government.

(b) The clerk of any court of this state, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, or other official who receives partial payments for restitution shall pay the restitution amount to the victim as provided in the restitution order not later than the last day of each month, provided that the amount exceeds $100.00. If the amount does not exceed $100.00, the clerk of any court of this state, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, or other official may allow the amount of restitution to accumulate until such time as it exceeds $100.00 or until the end of the next calendar quarter, whichever occurs first. (Code 1933, § 27-3008, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172; Ga. L. 2015, p. 422, § 5-36/HB 310.)

The 2015 amendment, effective July 1, 2015, substituted "community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42" for "probation officer or parole officer" throughout this Code section. See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

17-14-10. Factors to be considered by ordering authority in determining nature and amount of restitution.

JUDICIAL DECISIONS

Evaluation of defendant's ability to pay restitution. — Following the defendant's guilty plea to O.C.G.A. § 16-14-4(a) (RICO), an order of $725,000 restitution pursuant to O.C.G.A. § 17-14-3(a) was supported by evidence that the defendant had the capacity for gainful employment, notwithstanding the defendant's claim that the defendant was disabled; that the defendant had possessed hundreds of thousands of dollars of the victims' money; and that the defendant had a venture in which the defendant claimed $4.8 million. Nelson v. State, 329 Ga. App. 300, 764 S.E.2d 883 (2014).

Factors not considered. — Trial court erred in ordering the defendant to pay restitution in the amount of $7,584.35 to the Crime Victim Compensation Program and $1,000 in token restitution to the victim because the record contained no evidence to support the awards as the state presented no evidence supporting the state's request for $7,584.35, and the record did not show that the trial court considered the factors outlined in O.C.G.A. § 17-14-10(a) before requiring restitution as a condition of probation. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

Restitution order upheld as supported by the evidence.

Trial court's order regarding restitution was not erroneous as the trial court considered all the factors laid out in O.C.G.A. § 17-14-10(a) and based the court's restitution award on competent evidence proving the amount granted by a preponderance of the evidence. Graf v. State, 327 Ga. App. 598, 760 S.E.2d 613 (2014).

Restitution is limited by thefts during time period alleged in accusation. — Trial court erred in ordering restitution for $260,637 for thefts from the defendant's employer over a 12-year period because the accusation covered only a two-year period during which $57,000 was taken; under O.C.G.A. §§ 17-14-2(2) and 17-14-10, restitution was limited to damages which the victim could recover in a civil action based on the same act. Vaughn v. State, 324 Ga. App. 289, 750 S.E.2d 375 (2013).

Cited in Galimore v. State, 321 Ga. App. 886, 743 S.E.2d 545 (2013).

17-14-14. Restitution payments; wage assignments; review of compliance; interest.

(a) Payments pursuant to an order for restitution shall be made to the clerk of the court or to any other person, for the benefit of the victim or victims, as the ordering authority shall order.

(b) In each case in which payment of restitution is ordered as a condition of probation or parole, the ordering authority may require any employed offender to execute a wage assignment to pay the restitution.

(c) Until such time as the restitution has been paid or the sentence has been completed, the clerk of court or the community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42 assigned to the case, whoever is responsible for collecting restitution, shall review the case not less frequently than twice yearly to ensure that restitution is being paid as ordered. If the restitution was ordered to be made within a specific period of time, the case shall be

reviewed at the end of the specific period of time to determine if the restitution has been paid in full. The final review shall be conducted before the sentence or probationary or parole period expires. If it is determined at any review that restitution is not being paid as ordered, a written report of the violation shall be filed with the court on a form prescribed by the Council of Superior Court Clerks of Georgia.

(d) If the ordering authority permits the offender to pay restitution in other than a lump sum, the ordering authority may require the offender to pay interest on the amount of restitution due the victim or the victim's estate. Such interest shall be set at the same rate as is provided by Code Section 7-4-12 for judgments. (Code 1933, § 27-3014, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172; Ga. L. 2015, p. 422, § 5-37/HB 310.)

The 2015 amendment, effective July 1, 2015, substituted "community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42" for "probation or parole officer" in the first sentence in subsection (c). See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

17-14-16. Transmission of copies of restitution orders to the Department of Corrections or the Department of Juvenile Justice, and to the Department of Community Supervision.

If an offender who is ordered to pay restitution under this article is remanded to the jurisdiction of the Department of Corrections or the Department of Juvenile Justice, the court shall transmit a copy of the restitution order to such department and to the Department of Community Supervision when the order is issued. (Code 1933, § 27-3015, enacted by Ga. L. 1980, p. 1382, § 1; Ga. L. 2005, p. 88, § 5/HB 172; Ga. L. 2015, p. 422, § 5-38/HB 310.)

The 2015 amendment, effective July 1, 2015, substituted "transmit a copy of the restitution order to such department and to the Department of Community Supervision when the order is issued" for "provide a copy of the restitution order to such department when the offender is remanded to such department's jurisdiction". See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

17-14-17. Voidable transfers.

(a) The state or the victim of a crime may institute an action against an offender pursuant to Article 4 of Chapter 2 of Title 18, the "Uniform Voidable Transactions Act," to set aside a transfer of real, personal, or

other property made voluntarily by the offender on or after the date of the crime committed by the offender against the victim with the intent to:

(1) Conceal the crime or the fruits of the crime;

(2) Hinder, delay, or defraud any victim; or

(3) Avoid the payment of restitution.

(b) Any such action shall be filed within four years of the date the crime was committed. (Code 1981, § 17-14-17, enacted by Ga. L. 1998, p. 549, § 1; Ga. L. 2005, p. 88, § 5/HB 172; Ga. L. 2015, p. 996, § 4B-2/SB 65.)

The 2015 amendment, effective July 1, 2015, substituted "'Uniform Voidable Transactions Act" for "'Uniform Fraudulent Transfers Act" in the introductory language of subsection (a). See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides:

"(a) This Act shall be known and may be cited as the 'Debtor-Creditor Uniform Law Modernization Act of 2015.'

"(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships."

Ga. L. 2015, p. 996, § 7-1/SB 65, not codified by the General Assembly, provides, in part: "Part 2 of this Act shall apply to all actions filed on or after July 1, 2015, in which the recognition of a foreign country judgment is raised."

CHAPTER 15

VICTIM COMPENSATION

17-15-1. Legislative intent.

The General Assembly recognizes that many innocent persons suffer personal physical injury, serious mental or emotional trauma, severe financial hardship, or death as a result of criminal acts or attempted criminal acts. The General Assembly finds and determines that there is a need for assistance for such victims of crimes. Accordingly, it is the General Assembly's intent that under certain circumstances, aid, care, and assistance be provided by the state for such victims of crimes. (Code 1981, § 17-15-1, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 2009, p. 195, § 1/SB 172; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, substituted "crimes" for "crime" in the second and third sentences and inserted a comma after "circumstances" in the third sentence.

17-15-2. Definitions.

As used in this chapter, the term:

(1) "Board" means the Criminal Justice Coordinating Council.

(2) "Claimant" means any person filing a claim pursuant to this chapter.

(3) "Crime" means:

(A) An act which is committed in this state; in a state which does not have a victims' compensation program, if the claimant is a resident of this state; or in a state which has compensated the claimant in an amount less than the claimant would be entitled to pursuant to this chapter, if the claimant is a resident of this state, and which constitutes:

(i) Hit and run in violation of Code Section 40-6-270;

(ii) Homicide by vehicle in violation of Code Section 40-6-393;

(iii) Serious injury by vehicle in violation of Code Section 40-6-394;

(iv) A violation of Code Section 16-5-46;

(v) A violation of Chapter 6 of Title 16;

(vi) A violation of Part 2 of Article 3 of Chapter 12 of Title 16;

(vii) A violation of Code Section 16-5-70;

(viii) Aggravated assault with the intent to rape in violation of Code Section 16-5-21;

(ix) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or

(x) Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense;

(B) An act which constitutes international terrorism as defined in 18 U.S.C. Section 2331 against a resident of this state when such resident was outside the territorial boundaries of the United States when such act was committed; or

(C) An act of mass violence involving a resident of this state when such resident was outside the territorial boundaries of the United States when such act was committed.

(4) "Direct service provider" means a public or nonprofit entity which provides aid, care, and assistance.

(5) "Director" means the director of the Criminal Justice Coordinating Council.

(6) "Forensic medical examination" means an examination provided to a person pursuant to subsection (c) of Code Section 16-6-1 or subsection (c) of Code Section 16-6-2 by trained medical personnel in order to gather evidence. Such examination shall include, but shall not be limited to:

(A) An examination for physical trauma;

(B) A determination as to the nature and extent of the physical trauma;

(C) A patient interview;

(D) Collection and evaluation of the evidence collected; and

(E) Any additional testing deemed necessary by the examiner in order to collect evidence and provide treatment.

(7) "Fund" means the Georgia Crime Victims Emergency Fund.

(8) "Investigator" means an investigator of the board.

(9) "Serious mental or emotional trauma" means a nonphysical injury which has been documented by a licensed mental health professional and which meets the specifications promulgated by the

board's rules and regulations relating to this type of trauma. (Code 1981, § 17-15-2, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1994, p. 1800, § 1; Ga. L. 1997, p. 481, § 1; Ga. L. 2002, p. 843, § 2; Ga. L. 2009, p. 195, § 2/SB 172; Ga. L. 2011, p. 214, § 4/HB 503; Ga. L. 2011, p. 217, § 4/HB 200; Ga. L. 2012, p. 775, § 17/HB 942; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, rewrote subparagraph (3)(A); substituted the present provisions of subparagraph (3)(B) for the former provisions, which read: "An act which constitutes international terrorism as defined in 18 U.S.C. Section 2331 which results in physical injury, serious mental or emotional trauma, or death to the victim, if the victim is a resident of this state and is outside the territorial boundaries of the United States when such act is committed; or"; substituted the present provisions of subparagraph (3)(C) for the former provisions, which read: "An act of mass violence which results in physical injury, serious mental or emotional trauma, or death to the victim, if the victim is a resident of this state and is outside the territorial boundaries of the United States when such act is committed."; deleted "to a victim" at the end of paragraph (4); and deleted former paragraph (10), which read: "'Victim' means a person who:

"(A) Is injured physically, who dies, or who suffers financial hardship as a result of being injured physically as a direct result of a crime;

"(B) Suffers a serious mental or emotional trauma as a result of being threatened with a crime which could result in physical injury or death;

"(C) Suffers a serious mental or emotional trauma as a result of being present during the commission of a crime; or

"(D) Suffers a serious mental or emotional trauma as a result of being trafficked for labor or sexual servitude as defined in Code Section 16-5-46."

17-15-3. Georgia Crime Victims Compensation Board; members; director of Criminal Justice Coordinating Council.

(a) There is created the Georgia Crime Victims Compensation Board. The Criminal Justice Coordinating Council created under Chapter 6A of Title 35 shall serve as the Georgia Crime Victims Compensation Board.

(b) The Governor shall appoint the director of the Criminal Justice Coordinating Council to carry out the provisions of this chapter. (Code 1981, § 17-15-3, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1992, p. 2426, § 1; Ga. L. 1994, p. 1800, § 2; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, deleted former subsection (a), which read: "The five-member Georgia Crime Victims Compensation Board in existence on June 30, 1992, is abolished." and redesignated former subsections (b) and (c) as present subsections (a) and (b), respectively.

17-15-4. Powers of board.

(a) The board shall have the following powers and duties:

(1) To promulgate suitable rules and regulations to carry out the provisions and purposes of this chapter;

(2) To request from the Attorney General, the Department of Public Safety, the Georgia Bureau of Investigation, district attorneys, solicitors-general, judges, county and municipal law enforcement agencies, and any other agency or department such assistance and data as will enable the board to determine the needs state wide for victim compensation and whether, and the extent to which, a claimant qualifies for an award. Any person, agency, or department listed in this paragraph is authorized to provide the board with the information requested upon receipt of a request from the board. Any provision of law providing for confidentiality of records shall not apply to a request of the board pursuant to this Code section; provided, however, that the board shall preserve the confidentiality of any such records received;

(3) To hear and determine all appeals of denied claims for awards filed with the board pursuant to this chapter and to reinvestigate or reopen cases as the board deems necessary, including circumstances when it appears a claim may be time barred;

(4) To apply for funds from, and to submit all necessary forms to, any federal agency participating in a cooperative program to compensate victims of crimes and to receive and administer federal funds for the purposes of this chapter;

(5) To render awards to victims of crimes or to those other persons entitled to receive awards in the manner authorized by this chapter. Victim compensation payments may be made directly to direct service providers who are not the recipients of local, state, federal, or private grant funds awarded for purposes of providing direct services to victims of crimes. A victim or claimant may be paid directly in the case of lost wages, loss of support, and instances where the victim or claimant has paid the direct service provider and is filing for reimbursement. In all cases where the victim has incurred out-of-pocket expenses, such as lost wages or loss of support, or in cases where the victim or claimant has paid the direct service provider directly and is filing for reimbursement, the victim or claimant shall be paid first before any third party;

(6) To carry out programs designed to inform the public of the purposes of this chapter; and

(7) To render each year to the Governor and to the General Assembly a written report of its activities pursuant to this chapter.

(b) The board shall assist applicants with their claims for compensation through educational programs and administrative assistance. (Code 1981, § 17-15-4, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1992, p. 2426, § 2; Ga. L. 1994, p. 1800, § 3; Ga. L. 1996, p. 748, § 16; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, substituted "records shall" for "records does" in the last sentence of paragraph (a)(2); added ", including circumstances when it appears a claim may be time barred" at the end of paragraph (a)(3); substituted "crimes" for "crime" in paragraph (a)(4); and in paragraph (a)(5), substituted "victims of crimes" for "crime victims" in the second sentence and added a comma following "loss of support" in the last sentence.

17-15-5. Filing of claims; verification; contents.

(a) A claim may be filed by a person eligible to receive an award, as provided in Code Section 17-15-7, or, if such person is a minor, by his or her parent or guardian. In any case in which the person entitled to make a claim is mentally incompetent, the claim may be filed on his or her behalf by his or her guardian. In any case in which the person entitled to make a claim is deceased, the claim may be filed on his or her behalf by an individual authorized to administer his or her estate.

(b)(1) A claim shall be filed by a victim not later than three years after the occurrence of the crime upon which such claim is based or not later than three years after the death of the victim; provided, however, that if such victim was a minor at the time of the commission of the crime, he or she shall have until three years after his or her eighteenth birthday to file such claim; and provided, further, that upon good cause shown, the board may extend the time for filing a claim.

(2) Claims shall be filed in the office of the board in person or by mail.

(c) The claim shall be verified and shall contain the following:

(1) A description of the date, nature, and circumstances of the crime;

(2) A complete financial statement, including, but not limited to, the cost of medical care or burial expense, the loss of wages or support the claimant has incurred or will incur, any other emergency expenses incurred by the claimant, and the extent to which the claimant has been or may be indemnified for these expenses from any source;

(3) When appropriate, a statement indicating the extent of a victim's disability resulting from the injury or serious mental or emotional trauma incurred;

(4) An authorization permitting the board to verify the contents of the application; and

(5) Such other information as the board may require. (Code 1981, § 17-15-5, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1997, p. 481,

§ 2; Ga. L. 2005, p. 88, § 6/HB 172; Ga. L. 2009, p. 195, § 3/SB 172; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, in subsection (a), inserted "or her" in the first sentence and substituted the present provisions of the second sentence for the former provisions, which read: "In any case in which the person entitled to make a claim is mentally incompetent, the claim may be filed on his behalf by his guardian or such other individual authorized to administer his estate."; substituted the present provisions of subsection (b) for the former provisions, which read: "A claim must be filed by the claimant not later than one year after the occurrence of the crime upon which such claim is based or not later than one year after the death of the victim; provided, however, that, upon good cause shown, the board may extend that time for filing for a period not exceeding three years after such occurrence. Claims shall be filed in the office of the board in person or by mail."; substituted "claimant" for "victim" in three places in paragraph (c)(2); and substituted "a victim's disability" for "any disability" in paragraph (c)(3).

17-15-6. Investigation; decision by director; review by board; report to claimant.

(a) A claim, once accepted for filing and completed, shall be assigned to an investigator. The investigator shall examine the papers filed in support of the claim and cause an investigation to be conducted into the validity of the claim. The investigation shall include, but shall not be limited to, an examination of law enforcement, court, and official records and reports concerning the crime and an examination of medical, psychiatric, counseling, financial, and hospital reports relating to the injury, serious mental or emotional trauma, or loss upon which the claim is based. All claims arising from the death of an individual as a direct result of a crime shall be considered together by a single investigator.

(b) Claims shall be investigated and determined regardless of whether a perpetrator has been apprehended, prosecuted, or convicted of any crime based upon the same incident or whether the alleged perpetrator has been acquitted or found not guilty of the crime in question.

(c) The investigator conducting the investigation shall file with the director a written report setting forth a recommendation and the investigator's reason therefor. The director shall render a decision and furnish the claimant with a copy of the report if so requested. In cases where an investigative report is provided, information deemed confidential in nature shall be excluded.

(d) The claimant may, within 30 days after receipt of the report of the decision of the director, make an application in writing to the director for review of the decision.

(e) Upon receipt of an application for review pursuant to subsection (d) of this Code section, the director shall forward all relevant docu-

ments and information to the board. The board shall review the records and shall affirm or modify the decision of the director. If considered necessary by the board or if requested by the claimant, the board shall order a hearing prior to rendering a decision. At the hearing, any relevant evidence not legally privileged shall be admissible. The board shall render a decision within 90 days after completion of the investigation. If the director receives no application for review pursuant to subsection (d) of this Code section, the director's decision shall become final.

(f) The board, for purposes of this chapter, may subpoena witnesses, administer or cause to be administered oaths, and examine such parts of the books and records of the parties to proceedings as relate to questions in dispute.

(g) The director shall, within ten days after receipt of the board's final decision, make a report to the claimant, including a copy of the final decision and the reasons why the decision was made. (Code 1981, § 17-15-6, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1994, p. 1800, § 4; Ga. L. 2009, p. 195, § 4/SB 172; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, in subsection (a), inserted "shall" preceding "not be limited" in the second sentence and substituted "crime shall" for "crime must" in the fourth sentence; in subsection (b), substituted "Claims shall" for "Claims must", substituted "a perpetrator" for "the alleged criminal," and substituted "perpetrator" for "criminal"; in subsection (c), deleted "victim or" preceding "claimant" in the second sentence; and in subsection (e), inserted "shall" preceding "affirm" in the second sentence, substituted "privileged shall be admissible" for "privileged is admissible" in the fourth sentence, and substituted "shall become" for "becomes" in the last sentence.

17-15-7. Persons eligible for awards.

(a) Except as otherwise provided in this Code section, the following persons shall be eligible for awards pursuant to this chapter:

(1) A person who:

(A) Is injured physically, who dies, or who suffers financial hardship as a result of being injured physically as a direct result of a crime;

(B) Suffers a serious mental or emotional trauma as a result of being threatened with a crime which could result in physical injury or death;

(C) Suffers a serious mental or emotional trauma as a result of being present during the commission of a crime;

(D) Suffers a serious mental or emotional trauma as a result of being trafficked for labor servitude or sexual servitude as defined in Code Section 16-5-46; or

(E) Is a dependent spouse, parent, step-parent, child, or step-child of a person who is injured physically, who dies, or who suffers financial hardship as a result of being injured physically as a direct result of a crime;

(2) For purposes of an award under subsection (k) of Code Section 17-15-8, any member of the immediate family of a victim of homicide by vehicle caused by a violation of Code Section 40-6-391;

(3) Any person who goes to the aid of another and suffers physical injury, serious mental or emotional trauma, or death as a direct result of acting, not recklessly, to prevent the commission of a crime, to apprehend lawfully a person reasonably suspected of having committed a crime, or to aid the victim of a crime or any person who is injured, traumatized, or killed while aiding or attempting to aid a law enforcement officer in the prevention of a crime or apprehension of a criminal at the officer's request;

(4) Any person who is a victim of family violence as defined by Code Section 19-13-1 and anyone who is a victim as a result of a violation of Code Section 40-6-391; or

(5) Any person who is not a direct service provider and who assumes the cost of an eligible expense of a victim regardless of such person's relationship to the victim or whether such person is a dependent of the victim.

(b)(1) Victims may be legal residents or nonresidents of this state. A surviving spouse, parent, step-parent, child, or step-child who is legally dependent for his or her principal support upon a deceased victim shall be entitled to file a claim under this chapter if the deceased victim would have been so entitled, regardless of the residence or nationality of the surviving spouse, parent, step-parent, child, or step-child.

(2) Victims of crimes occurring within this state who are subject to federal jurisdiction shall be compensated on the same basis as resident victims of crimes.

(c) No award of any kind shall be made under this chapter to a victim injured while confined in any federal, state, county, or municipal jail, prison, or other correctional facility.

(d) No award of any kind shall be made under this chapter to a victim of a crime which occurred prior to July 1, 1989.

(e) A person who is criminally responsible for the crime upon which a claim is based or is an accomplice of such person shall not be eligible

to receive an award with respect to such claim; provided, however, that such ineligibility shall not apply if the person is as defined in subparagraph (a)(1)(D) of this Code section.

(f) There shall be no denial of compensation to a claimant based on that victim's or claimant's familial relationship with the person who is criminally responsible for the crime.

(g) No award of any kind shall be made under this chapter to a victim of a crime for loss of property.

(h) A victim or claimant who has been convicted of a felony involving criminally injurious conduct and who is currently serving a sentence therefor shall not be considered eligible to receive an award under this chapter. For purposes of this subsection, "criminally injurious conduct" means a crime which occurs or is attempted in this state that results in physical injury, serious mental or emotional trauma, or death to a victim, which act is punishable by fine, imprisonment, or death. Such term shall not include acts arising out of the operation of motor vehicles, boats, or aircraft unless the acts were committed with the intent to inflict injury, trauma, or death or unless the acts committed were in violation of Code Section 40-6-391. For the purposes of this subsection, a person shall be deemed to have committed criminally injurious conduct notwithstanding that by reason of age, insanity, drunkenness, or other reason, he or she was legally incapable of committing a crime. (Code 1981, § 17-15-7, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1992, p. 2426, § 3; Ga. L. 1994, p. 1800, § 5; Ga. L. 1997, p. 481, § 3; Ga. L. 2004, p. 709, § 3; Ga. L. 2009, p. 195, § 5/SB 172; Ga. L. 2011, p. 217, § 5/HB 200; Ga. L. 2014, p. 354, § 1/SB 187; Ga. L. 2015, p. 1029, § 1/SB 79.)

The 2014 amendment, effective July 1, 2014, in subsection (a), substituted "persons shall be" for "persons are" in the introductory paragraph; substituted "person who" for "victim" in paragraph (a)(1); added subparagraphs (a)(1)(A) through (a)(1)(E); deleted former paragraph (a)(2), which read: "A dependent spouse or child of a victim;"; redesignated former paragraph (a)(2.1) as present paragraph (a)(2); inserted "a" preceding "crime or apprehension" near the end of paragraph (a)(3); substituted "victim shall be" for "victim is" in the second sentence of paragraph (b)(1); substituted "crimes" for "crime" at the end of paragraph (b)(2); substituted "person is as defined in subparagraph (a)(1)(D) of this Code section" for "claimant is a victim as defined in subparagraph (D) of paragraph (10) of Code Section 17-15-2" near the end of subsection (e); in subsection (f), substituted "claimant" for "victim" and inserted "or claimant's" following "victim's"; and substituted "means a crime" for "means an act" in the second sentence of subsection (h).

The 2015 amendment, effective May 6, 2015, substituted "spouse, parent, step-parent, child, or step-child of" for "spouse or child of" in subparagraph (a)(1)(E); and substituted "parent, step-parent, child, or step-child" for "parent or child" twice in the second sentence of paragraph (b)(1).

17-15-8. Required findings; amount of award; rejection of claim; reductions; exemption from garnishment and execution; exemption from treatment as ordinary income; effective date for awards; psychological counseling for relatives of deceased; memorials for victims of DUI homicide.

(a) No award may be made unless the board or director finds that:

(1) A crime was committed;

(2) The crime directly resulted in the victim's physical injury, serious mental or emotional trauma, or financial hardship as a result of the victim's physical injury, serious mental or emotional trauma, or the victim's death;

(3) Police records, records of an investigating agency, or records created pursuant to a mandatory reporting requirement show that the crime was promptly reported to the proper authorities. In no case may an award be made where the police records, records of an investigating agency, or records created pursuant to a mandatory reporting requirement show that such report was made more than 72 hours after the occurrence of such crime unless the board, for good cause shown, finds the delay to have been justified and provided, further, that good cause shall be presumed if the person is eligible for awards pursuant to this chapter corresponding to subparagraph (a)(1)(D) of Code Section 17-15-7; and

(4) The applicant has pursued restitution rights against any person who committed the crime unless the board or director determines that such action would not be feasible.

(a.1) The board, upon finding that any claimant or award recipient has not fully cooperated with all law enforcement agencies, may deny, reduce, or withdraw any award.

(b) Any award made pursuant to this chapter shall be in an amount not exceeding actual expenses, including indebtedness reasonably incurred for medical expenses, loss of wages, funeral expenses, mental health counseling, or support for dependents of a deceased victim necessary as a direct result of the injury or hardship upon which the claim is based.

(c)(1) Notwithstanding any other provisions of this chapter, no award made under the provisions of this chapter shall exceed $1,000.00 in the aggregate; provided, however, that with respect to any claim filed with the board as a result of a crime occurring on or after July 1, 1994, no award made under the provisions of this chapter payable to a claimant sustaining economic loss because of injury to or death of a

victim shall exceed $5,000.00 in the aggregate; provided, further, that with respect to any claim filed with the board as a result of a crime occurring on or after July 1, 1995, no award made under the provisions of this chapter payable to a claimant sustaining economic loss because of injury to or death of a victim shall exceed $10,000.00 in the aggregate; provided, further, that with respect to any claim filed with the board as a result of a crime occurring on or after July 1, 2002, no award made under the provisions of this chapter payable to a claimant sustaining economic loss because of injury to or death of a victim shall exceed $25,000.00 in the aggregate; provided, further, that with respect to any claim filed with the board for serious mental or emotional trauma, no award shall be made for a crime occurring before July 1, 2009.

(2) No award under this chapter for the following losses shall exceed the maximum amount authorized:

Category	Maximum Award
Lost wages	$ 10,000.00
Funeral expenses	6,000.00
Financial hardship or loss of support	10,000.00
Medical	15,000.00
Counseling	3,000.00
Crime scene sanitization	1,500.00

(d) In determining the amount of an award, the director and board shall determine whether because of his or her conduct the victim contributed to the infliction of his or her injury, serious mental or emotional trauma, or financial hardship, and the director and board may reduce the amount of the award or reject the claim altogether in accordance with such determination.

(e) The director and board may reject an application for an award when the claimant has failed to cooperate in the verification of the information contained in the application.

(f) Any award made pursuant to this chapter may be reduced by or set off by the amount of any payments received or to be received as a result of the injury, serious mental or emotional trauma:

(1) From or on behalf of the person who committed the crime; and

(2) From any other private or public source, including an award of workers' compensation pursuant to the laws of this state,

provided that private sources shall not include contributions received from family members or persons or private organizations making charitable donations to a claimant.

(g) No award made pursuant to this chapter shall be subject to garnishment, execution, or attachment other than for expenses resulting from the injury or serious mental or emotional trauma which is the basis for the claim.

(h) An award made pursuant to this chapter shall not constitute a payment which is treated as ordinary income under either the provisions of Chapter 7 of Title 48 or, to the extent lawful, under the United States Internal Revenue Code.

(i) Notwithstanding any other provisions of this chapter to the contrary, no awards from state funds shall be paid to a claimant for a crime which occurred prior to July 1, 1989.

(j) In any case where a crime results in death, the spouse, parents, step-parents, children, step-children, siblings, or step-siblings of such deceased victim may be considered eligible for an award for the cost of psychological counseling which is deemed necessary as a direct result of said criminal incident. The maximum award for said counseling expenses shall not exceed $3,000.00 for each claimant identified in this subsection.

(k)(1) In addition to any other award authorized by this Code section, in any case where a deceased was a victim of homicide by vehicle caused by a violation of Code Section 40-6-391 on any road which is part of the state highway system, upon request of the next of kin of the deceased, an award of compensation in the form of a memorial sign erected by the Department of Transportation as provided by this subsection shall be paid to an eligible claimant.

(2) The provisions of paragraph (4) of subsection (a) of this Code section shall not apply for purposes of eligibility for awards made under this subsection, and the value of any award paid to a claimant under this subsection shall not apply toward or be subject to any limitation on award amounts paid to any claimant under other provisions of this Code section.

(3) The Department of Transportation, upon receiving payment for the cost of materials and labor from the board, shall upon request of the next of kin of the deceased erect a sign memorializing the deceased on the right of way of such public highway at the location of the accident or as near thereto as safely and reasonably possible and shall maintain such sign for a period of five years from the date the sign is erected unless its earlier removal is requested in writing by the next of kin. Such sign shall be 24 inches wide by 36 inches high

and depict a map of the State of Georgia, with a dark blue background and a black outline of the state boundaries. A border of white stars shall be placed on the inside of the state boundaries, and the sign shall contain the words "In Memory of (name), DUI Victim (date of accident)."

(4) In the event of multiple such claims arising out of a single motor vehicle accident, the names of all deceased victims for whom such claims are made and for whom a request has been made by the next of kin of the deceased may be placed on one such sign or, if necessary, on one such sign and a plaque beneath of the same color as the sign. In the event of multiple claims relating to the same deceased victim, no more than one such sign shall be paid for and erected for such victim. (Code 1981, § 17-15-8, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1992, p. 2426, §§ 4, 5; Ga. L. 1994, p. 1800, § 6; Ga. L. 1995, p. 385, § 1; Ga. L. 1997, p. 481, § 4; Ga. L. 2002, p. 843, § 3; Ga. L. 2004, p. 631, § 17; Ga. L. 2004, p. 709, § 4; Ga. L. 2009, p. 195, § 6/SB 172; Ga. L. 2011, p. 217, § 6/HB 200; Ga. L. 2014, p. 354, § 1/SB 187; Ga. L. 2014, p. 354, § 17/SB 340; Ga. L. 2015, p. 1029, § 2/SB 79.)

The 2014 amendments. — The first 2014 amendment, effective July 1, 2014, substituted "if the person is eligible for awards pursuant to this chapter corresponding to subparagraph (a)(1)(D) of Code Section 17-15-7" for "if the claimant is a victim as defined in subparagraph (D) of paragraph (10) of Code Section 17-15-2" near the end of paragraph (a)(3); designated the ending paragraph of subsection (a) as subsection (a.1); substituted "chapter shall" for "chapter may" near the beginning of subsection (b); in paragraph (c)(1), inserted "that" following "provided, however,", inserted "that" following "provided, further," throughout, substituted "payable to a claimant" for "payable to a victim and to all other claimants" in three places, and substituted "a victim shall exceed" for "such victim shall exceed" in three places; deleted "of such crime" following "conduct the victim" in subsection (d); substituted "claimant" for "victim" at the end of subsection (f); substituted "chapter shall be" for "chapter is" in subsection (g); and inserted "to a claimant for a crime which occurred" in subsection (i). The second 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, substituted "that with respect" for "with respect" in paragraph (c)(1).

The 2015 amendment, effective May 6, 2015, substituted "6,000" for "3,000" following the entry of "Funeral expenses" in the table in paragraph (c)(2); and substituted "the spouse, parents, step-parents, children, step-children, siblings, or step-siblings" for "the spouse, children, parents, or siblings" in the first sentence in subsection (j).

17-15-9. Georgia Crime Victims Emergency Fund created; administration; moneys; payments authorized.

(a) There is created a fund to be known as the Georgia Crime Victims Emergency Fund. The custodian of the fund shall be the board. The director shall administer the fund and may invest the resources of the fund in the same manner and fashion that an insurer authorized to issue contracts of life insurance is authorized to invest its resources.

The board shall be specifically authorized to contract with any person or organization, public or private, to administer the fund, assume the powers of the director, and carry out the duties of the board relating to the fund.

(b)(1) The fund shall consist of all moneys received pursuant to Article 7 of Chapter 21 of Title 15 from the assessment of additional penalties in cases involving a violation of Code Section 40-6-391 or a violation of an ordinance of a political subdivision of this state which has adopted by reference Code Section 40-6-391 pursuant to Article 14 of Chapter 6 of Title 40.

(2) The funds placed in the fund shall also consist of all moneys appropriated by the General Assembly, if any, for the purpose of compensating claimants under this chapter and money recovered on behalf of the state pursuant to this chapter by subrogation or other action, recovered by court order, received from the federal government, received from additional court costs, received from specific tax proceeds allocated to the fund, received from other assessments or fines, or received from any other public or private source pursuant to this chapter.

(c) All funds appropriated to or otherwise paid into the fund shall be presumptively concluded to have been committed to the purpose for which they have been appropriated or paid and shall not lapse.

(d) The board shall be authorized, subject to the limitations contained in this chapter, to pay the appropriate compensation to the persons eligible for compensation under this chapter from the proceeds of the fund.

(e) After determining that an award should be paid and the method of payment, the board or director, within five days, shall be authorized to draw a warrant or warrants upon the fund to pay the amount of the award from such fund. (Code 1981, § 17-15-10, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1992, p. 1836, § 2; Ga. L. 1993, p. 91, § 17; Code 1981, § 17-15-9, as redesignated by Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, redesignated former Code Section 17-15-10 as present Code Section 17-15-9; substituted "board shall be" for "board is" near the beginning of the last sentence in subsection (a) and in subsection (d); deleted ", relating to driving under the influence of alcohol or drugs," following "Code Section 40-6-391" in paragraph (b)(1); and substituted "fund" for "Georgia Crime Victims Emergency Fund" at the end of subsection (d) and near the end of subsection (e).

Editor's notes. — This Code section formerly pertained to payment where insufficient funds in Georgia Crime Victims Emergency Fund. The former Code section was based on Code 1981, § 17-15-9, enacted by Ga. L. 1988, p. 591, § 1, and was repealed by Ga. L. 2014, p. 354, § 1/SB 187, effective July 1, 2014.

17-15-10. Insufficient funds to pay authorized award.

Notwithstanding any other provision of this chapter to the contrary, where an award under this chapter has been authorized but there are not sufficient funds in the fund to pay or continue paying the award, then the award or the remaining portion thereof shall not be paid unless and until sufficient funds become available from the fund, and at such time, awards which have not been paid shall begin to be paid in chronological order with the oldest award being paid first. In the event an award was to be paid in installments and some remaining installments have not been paid due to a lack of funds, then when funds due become available, that award shall be paid in full when its appropriate time for payment comes on the chronological list before any other postdated award shall be paid. Any award under this chapter is specifically not a claim against the state if it cannot be paid due to a lack of funds in the fund. (Code 1981, § 17-15-10, enacted by Ga. L. 2014, p. 354, § 1/SB 187.)

Effective date. — This Code section became effective July 1, 2014.

Editor's notes. — Ga. L. 2014, p. 354, § 1/SB 187, effective July 1, 2014, redesignated former Code Section 17-15-10 as present Code Section 17-15-9. Former Code Section 17-15-10 pertained to the creation of the Georgia Crime Victims Emergency Fund, administration, moneys, and payments authorized.

17-15-11. False claims.

Any person who asserts a false claim under the provisions of this chapter shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as for a misdemeanor and shall further forfeit any benefit received and shall reimburse and repay the state for payments received or paid on his or her behalf pursuant to any of the provisions of this chapter. (Code 1981, § 17-15-11, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, inserted "or her" near the end of this Code section.

17-15-12. Effect of accepting award.

(a) Acceptance of an award made pursuant to this chapter shall subrogate the state, to the extent of such award, to any right or right of action occurring to the claimant to recover payments on account of losses resulting from the crime with respect to which the award is made. The board may waive subrogation when the claimant presents documentation and the board verifies that judgment, settlement, or other sources have not fully reimbursed the claimant for expenses compensable under this chapter.

(b) Acceptance of an award made pursuant to this chapter based on damages from a crime shall constitute an agreement on the part of the recipient reasonably to pursue any and all civil remedies arising from any right of action against the person or persons responsible for or committing the crime. (Code 1981, § 17-15-12, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 2008, p. 486, § 4/HB 1297; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, in subsection (a), deleted "or the victim" following "the claimant" in the first sentence and deleted "victim or" preceding "claimant" twice in the second sentence; and in subsection (b), substituted "crime" for "criminal act" near the middle and substituted "crime" for "act" at the end.

17-15-13. Debt to state created; payment as condition of probation or parole; payment into fund.

(a) Any award or payment of benefits under this chapter shall create a debt due and owing to the state by any person found in a court of competent jurisdiction of this state to have committed an act resulting in compensation being paid pursuant to this chapter.

(b) A court, when placing on probation any person who owes a debt to the state as a consequence of a crime, may set as a condition of probation the payment of the debt or a portion of the debt to the state. The court may also set the schedule or amounts of payments subject to modification based on change of circumstances.

(c) The State Board of Pardons and Paroles shall also have the right to make payment of the debt or a portion of the debt to the state a condition of parole.

(d) When a child is adjudicated for committing a delinquent act in a juvenile court proceeding involving a crime upon which a claim under this chapter can be made, the juvenile court in its discretion may order that the child pay the debt to the state as an adult would have to pay had an adult committed the crime. Any assessments so ordered may be made a condition of probation as provided in Code Section 15-11-601.

(e) Payments authorized or required under this Code section shall be paid into the fund. The board shall coordinate the development of policies and procedures for the State Board of Pardons and Paroles, the Department of Community Supervision, and the Administrative Office of the Courts to assure that restitution programs are administered in an effective manner to increase payments into the fund.

(f) In every case where an individual is serving under active probation supervision and paying a supervision fee, $9.00 per month shall be added to any supervision fee collected by any entity authorized to

collect such fees and shall be paid into the fund. This subsection shall apply to probationers supervised under by community supervision officers or private probation officers or probation officers pursuant to Article 6 of Chapter 8 of Title 42. The probation supervising entity shall collect and forward the $9.00 fee to the board by the end of each month. (Code 1981, § 17-15-13, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1998, p. 840, § 1; Ga. L. 2000, p. 20, § 9; Ga. L. 2002, p. 843, § 4; Ga. L. 2013, p. 294, § 4-20/HB 242; Ga. L. 2014, p. 354, § 1/SB 187; Ga. L. 2015, p. 422, § 5-39/HB 310.)

The 2014 amendment, effective July 1, 2014, in subsection (a), deleted "to, or on behalf of, a victim or eligible family member" following "payment of benefits" and substituted "an act resulting in compensation being paid pursuant to this chapter" for "such criminal act"; substituted "crime" for "criminal act" in the first sentence of subsection (b); substituted "fund" for "Georgia Crime Victims Emergency Fund" in the first sentence of subsections (e) and (f); deleted "victim" preceding "restitution" in the last sentence of subsection (e); and substituted "board" for "Georgia Crime Victims Compensation Board" in the last sentence of subsection (f).

The 2015 amendment, effective July 1, 2015, inserted ", the Department of Community Supervision," in the last sentence in subsection (e); and substituted "by community supervision officers or private probation officers or probation officers pursuant to Article 6 of Chapter 8 of Title 42" for "either Code Section 42-8-20 or 42-8-100" in the second sentence in subsection (f). See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

JUDICIAL DECISIONS

Restitution award not supported by evidence. — Trial court erred in ordering the defendant to pay restitution in the amount of $7,584.35 to the Crime Victim Compensation Program and $1,000 in token restitution to the victim because the record contained no evidence to support the awards as the state presented no evidence supporting the state's request for $7,584.35, and the record did not show that the trial court considered the factors outlined in O.C.G.A. § 17-14-10(a) before requiring restitution as a condition of probation. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

17-15-14. Funding to victim service providers for disseminating information.

The board shall be authorized to designate and expend not more than 10 percent of the moneys collected and paid into the fund pursuant to paragraph (1) of subsection (b) of Code Section 17-15-9 and Code Section 17-15-13 to provide funding to victim service providers for the purpose of disseminating materials regarding the availability of the compensation program provided in this chapter and public information purposes regarding the compensation program provided in this chapter. (Code 1981, § 17-15-14, enacted by Ga. L. 1994, p. 1800, § 7; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, substituted "Code Section 17-15-9" for "Code Section 17-15-10", substituted "the compensation program provided in this chapter" for "compensation for victims of crime", and deleted "victim" preceding "compensation" near the end.

17-15-15. Responsibility for cost of forensic medical examination.

When a forensic medical examination is conducted, the cost of such forensic medical examination shall be paid for by the fund in an amount not to exceed $1,000.00. The fund shall be responsible for payment of such cost notwithstanding whether the person receiving such forensic medical examination has health insurance or any other source of health care coverage. (Code 1981, § 17-15-15, enacted by Ga. L. 2011, p. 214, § 5/HB 503; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, inserted "forensic medical" in the first and second sentences.

17-15-16. Funding for costs of forensic interviews for persons less than 18 years of age or developmentally disabled.

(a) When a forensic interview is conducted and when funding is available, the cost of such interview for a person who is less than 18 years of age or developmentally disabled may be paid for by the fund in an amount to be determined by the board.

(b) The board shall develop standards, protocols, and guidelines related to reimbursement of forensic interview providers.

(c) The board shall establish an annual limit of:

(1) The amount that may be paid from the fund:

(2) The amount that may be reimbursed for each interview; and

(3) The limit on the number of interviews that will be reimbursable from the fund.

(d) Funding may be used only when:

(1) The results of the forensic interview will be for identification of the interviewee's needs, including social services, personal advocacy, case management, substance abuse treatment, and mental health services;

(2) The forensic interviews are conducted in the context of a multidisciplinary investigation and diagnostic team, or in a specialized setting such as a child advocacy center; and

(3) The interviewer is trained to conduct forensic interviews appropriate to the developmental age and abilities of children, or the

developmental, cognitive, and physical or communication disabilities presented by adults. (Code 1981, § 17-15-16, enacted by Ga. L. 2014, p. 354, § 1/SB 187.)

Effective date. — This Code section became effective July 1, 2014.

CHAPTER 16

DISCOVERY

ARTICLE 1

DEFINITIONS; FELONY CASES

17-16-1. Definitions.

JUDICIAL DECISIONS

Cited in Morris v. State, 324 Ga. App. 756, 751 S.E.2d 551 (2013).

17-16-2. Applicability of article.

JUDICIAL DECISIONS

Defendant's failure to give notice to the prosecuting attorney.

The state was not required to give notice of the state's intent to use a prior conviction in the sentencing hearing since the defendant did not provide the required notice. Kiser v. State, 2014 Ga. App. LEXIS 119 (Mar. 7, 2014).

With regard to the defendant's domestic violence convictions, the trial court did not err in denying the admission into evidence of a photograph detailing the defendant's injuries based on failing to provide inspection of the photograph because any error by the trial court in excluding the photograph was harmless since the photograph was cumulative of both the defendant's testimony that the wife scratched the defendant as well as the wife's testimony that the wife tried to scratch the defendant. Palmer v. State, 330 Ga. App. 679, 769 S.E.2d 107 (2015).

17-16-4. Disclosure required by prosecuting attorney and defendant; inspections allowed; reducing oral reports to writing; continuing duty to disclose; discovery creating threat of physical or economic harm.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
STATE'S DUTY TO COMPLY

SCIENTIFIC REPORTS
STATE'S DUTY TO COMPLY WITH REQUEST

General Consideration

Constitutionality.

Defendant, who was charged with child pornography, did not suffer a due process violation due to the U.S. Attorney's office not responding to letters seeking assurance that the defendant's expert would not be prosecuted under federal pornography laws for examining the defendant's computer hard drive; the trial court ordered that the expert be provided with a copy of the defendant's computer hard drive, and the trial court's order requiring written assurances from United States Attorneys of nonprosecution of the expert for any potential violations of federal child pornography statutes exceeded the trial court's authority. The trial court's finding that O.C.G.A. § 17-16-4(a)(3)(B) was unconstitutional as applied to the defendant because the statute deprived the defendant of due process rights was not challenged by the state on appeal. Morris v. State, 324 Ga. App. 756, 751 S.E.2d 551 (2013).

Untimely disclosure. — Although the state did not provide the defendant with records showing the defendant previously threatened to the kill the victim in a timely fashion, the defendant was not prejudiced as the defendant was aware that the state intended to present such evidence based on other documents provided earlier. Thompson v. State, 295 Ga. 96, 757 S.E.2d 846 (2014).

Intent to use defendant's prior conviction at sentencing. — Because the trial court excluded the defendant's prior conviction based upon a belief that the court had no discretion based on the state's failure to give notice of the state's intent to use the prior conviction as required by O.C.G.A. § 17-16-4(a)(5), the trial court could consider the court's options under O.C.G.A. § 17-16-6 before re-sentencing. Kiser v. State, 327 Ga. App. 17, 755 S.E.2d 505 (2014).

Notice of intent sufficient for recidivist punishment.

Because the evidence showed that the state notified the defendant of the state's continuing intention to use the defendant's prior convictions in aggravation of punishment at the second trial, and the defendant was aware of that intention, the defendant's motion for new trial on the ground that the state had failed to provide new written notices of recidivism to the defendant after the first trial was denied. Thomas v. State, 324 Ga. App. 898, 752 S.E.2d 67 (2013).

Defendant had sufficient notice of the state's decision to seek recidivist punishment when the state provided such notice several months before trial and attacked the defendant's Georgia Crime Information Center report. Barstad v. State, 329 Ga. App. 214, 764 S.E.2d 453 (2014).

Failure to obtain recidivist notice of accomplice. — Defendant's counsel was not ineffective for failing to obtain a copy of the recidivist notice filed against an accomplice because a recidivist notice indicated only possible sentences, and because the trial court ruled that no inquiry into such possible penalties was allowed in the accomplice's cross-examination, there was no likelihood of prejudice to the defendant as a result of counsel's failure to obtain the notice. Jackson v. State, 294 Ga. 34, 751 S.E.2d 63 (2013).

Mistrial properly denied.

As the state did not attempt to impeach the defendant with the defendant's custodial statement that was first disclosed during the charge conference, the defendant was not harmed by the state's belated disclosure of the statement and the trial court did not err in denying the defendant's motion for mistrial based on the state's untimely disclosure of the defendant's custodial statement. Burton v. State, 330 Ga. App. 503, 767 S.E.2d 510 (2014).

Trial court did not err in denying the defendant's motion for a mistrial based on the prosecutor's misconduct in failing to disclose the statement the defendant made to the first investigator until eliciting testimony about the statement from the first investigator at trial because the undisclosed statement that the defendant made to the first investigator was the

same in substance as the defendant's longer, more detailed, and audio-recorded statement to the second investigator, which was properly disclosed to the defendant and was played for the jury at trial; and trial counsel admitted that the first investigator's testimony did not provide any information from the defendant that had not already been disclosed in discovery. Prince v. State, 295 Ga. 788, 764 S.E.2d 362 (2014).

State's Duty to Comply

Late disclosure of newly discovered evidence. — Defendant's request for a mistrial after receiving new evidence five days before trial was properly denied as the state turned over the information as soon as the information was discovered, the defendant failed to request a continuance, and the evidence was part of the res gestae of the charged crime. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

Photographs.

With regard to the defendant's domestic violence convictions, the trial court did not err in denying the admission into evidence of a photograph detailing the defendant's injuries based on failing to provide inspection of the photograph because any error by the trial court in excluding the photograph was harmless since the photograph was cumulative of both the defendant's testimony that the wife scratched the defendant as well as the wife's testimony that the wife tried to scratch the defendant. Palmer v. State, 330 Ga. App. 679, 769 S.E.2d 107 (2015).

Ineffective assistance of counsel for failing to challenge sufficiency of notice. — Defendant failed to show trial counsel's performance was deficient for failing to challenge the sufficiency of the state's notice of intent to seek punishment as a recidivist because there was no evidence in the record that the state failed to provide a copy of the criminal history report, nor was there any evidence that the defendant and counsel were unaware of the specific felony convictions listed in the criminal history record. Williams v. State, 326 Ga. App. 784, 757 S.E.2d 448 (2014).

State's discovery obligations met.

Four boxes of documents were properly admitted into evidence despite the defendant's claim that the documents had not been made available during discovery because the documents had been provided to previous trial counsel and counsel and an associate were given a break during trial to review the documents. Raymond v. State, 322 Ga. App. 404, 745 S.E.2d 689 (2013).

Trial court did not err in denying defendant's motion for a new trial based on the prosecution's failure to disclose the existence of certain documents because the prosecutor gave notice to the defendant that the physical objects were available for inspection, copying, or photographing and O.C.G.A. § 17-16-4(a)(3)(A) did not require the state to take the initiative and furnish the defense with copies of physical evidence. Ananaba v. State, 325 Ga. App. 829, 755 S.E.2d 225 (2014).

Plain language of O.C.G.A. § 17-16-4(a)(3)(A) does not require the state to take the initiative and furnish the defense with copies of physical evidence; the state fulfills the state's obligation by making the evidence available to the defense to inspect and copy. Ananaba v. State, 325 Ga. App. 829, 755 S.E.2d 225 (2014).

Trial court did not err in refusing to grant a mistrial based on the state's failure to disclose a therapist's notes until just before trial began as the state shared the notes shortly after receiving the notes, the defendant asserted no bad faith on the part of the state, the defendant was granted a short continuance to review the materials, and the defendant had notice that the therapist might testify two weeks before trial and could have retained an expert to counter the therapist's testimony. Reinhard v. State, 331 Ga. App. 235, 770 S.E.2d 314 (2015).

Scientific Reports

Service of scientific reports not required.

Defendant's ineffective assistance of counsel claim failed based on defense counsel failing to object to the testimony of a firearms examiner concerning the

Scientific Reports (Cont'd)

results of the examiners' ballistics examination because the testimony complained of was elicited by the co-defendant during cross-examination and not by the state so the state had no obligation to provide the defendant with notice of the firearms examiner's opinion and the defendant also failed to show any prejudice or bad faith. Bryant v. State, 296 Ga. 456, 769 S.E.2d 57 (2015).

State's Duty to Comply with Request

Defendant's remedy for noncompliance.

Proper remedy for the state's failure to comply with O.C.G.A. § 17-16-4(a)(4) was to postpone the testimony of the state's blood spatter expert until late in the trial as the trial court did, pursuant to O.C.G.A. § 17-16-6. Further, by failing to ask for more time to prepare for the expert, the defendant waived any claim of error. Valentine v. State, 293 Ga. 533, 748 S.E.2d 437 (2013).

17-16-5. Alibi witnesses.

JUDICIAL DECISIONS

Failure to timely come forward with alibi defense.

Exclusion of alibi evidence was not error as the defendant failed to notify the state of the alibi until the day of trial, despite the prosecutor's request for such evidence no more than five days prior to trial. Rembert v. State, 324 Ga. App. 146, 749 S.E.2d 744 (2013).

Counsel not ineffective for failing to object that notice not required. — Counsel was not ineffective in failing to specifically object that the defendant was not required to give the state notice of an alibi defense because, even if the trial court erred in failing to give an alibi instruction to the jury, the defendant was not prejudiced as the evidence did not provide the defendant a good alibi for the crime; the defendant admitted being at the crime scene with the victim on the night of the murder; and the girlfriend's testimony about when the defendant was home left the defendant ample time to kill the victim that night, and did not put the defendant at home when the minivan, like the one the defendant borrowed, was seen near the crime scene at about 1:30 A.M. Prince v. State, 295 Ga. 788, 764 S.E.2d 362 (2014).

17-16-6. Failure to comply with discovery requirements.

JUDICIAL DECISIONS

Failure to timely come forward with alibi defense.

Exclusion of alibi evidence was not error as the defendant failed to notify the state of the alibi until the day of trial, and the finding that the defendant acted in bad faith was supported by the fact that the defendant presumably knew of an alibi when arrested but did not tell the arresting or investigating officers and neither alibi witness came forward to tell the prosecution or defense counsel of the alibi. Rembert v. State, 324 Ga. App. 146, 749 S.E.2d 744 (2013).

Delaying expert witness's testimony as remedy. — Proper remedy for the state's failure to comply with O.C.G.A. § 17-16-4(a)(4) was to postpone the testimony of the state's blood spatter expert until late in the trial as the trial court did, pursuant to O.C.G.A. § 17-16-6. Further, by failing to ask for more time to prepare

for the expert, the defendant waived any claim of error. Valentine v. State, 293 Ga. 533, 748 S.E.2d 437 (2013).

Trial court's failure to exercise discretion. — Because the trial court excluded the defendant's prior conviction based upon a belief that the court had no discretion based on the state's failure to give notice of the state's intent to use the prior conviction as required by O.C.G.A. § 17-16-4(a)(5), the trial court could consider the court's options under O.C.G.A. § 17-16-6 before re-sentencing. Kiser v. State, 327 Ga. App. 17, 755 S.E.2d 505 (2014).

Service of scientific reports not required for admission. — Defendant's ineffective assistance of counsel claim failed based on defense counsel failing to object to the testimony of a firearms examiner concerning the results of their ballistics examination because the testimony complained of was elicited by a co-defendant during cross-examination and not by the state so the state had no obligation to provide the defendant with notice of the firearms examiner's opinion and the defendant also failed to show any prejudice or bad faith. Bryant v. State, 296 Ga. 456, 769 S.E.2d 57 (2015).

Harmless error.

With regard to the defendant's domestic violence convictions, the trial court did not err in denying the admission into evidence of a photograph detailing the defendant's injuries based on failing to provide inspection of the photograph because any error by the trial court in excluding the photograph was harmless since the photograph was cumulative of both the defendant's testimony that the wife scratched the defendant as well as the wife's testimony that the wife tried to scratch the defendant. Palmer v. State, 330 Ga. App. 679, 769 S.E.2d 107 (2015).

Exclusion of witness was error.

Trial court erred in excluding testimony from two witnesses who came forward after the trial had started, because defense counsel could not have disclosed them prior to trial due to a lack of knowledge that they existed, and thus, there was no bad faith on the part of defense counsel. Mitchell v. State, 326 Ga. App. 899, 755 S.E.2d 308 (2014).

Mistrial not required.

With regard to the defendant's murder conviction, the defendant was not entitled to a mistrial because the state failed to provide an accomplice's statement about an alleged conversation between the defendant and a codefendant indicating a consciousness of guilt as the record showed that the witness was available to the parties for interview through an attorney prior to trial and the testimony provided at trial had not been reduced to a writing or otherwise recorded, but rather had been revealed during an interview the state conducted for the purposes of trial preparation; thus, there was nothing for the state to produce during discovery. Lewis v. State, 293 Ga. 110, 744 S.E.2d 21 (2013).

Trial court did not err in denying the defendant's motion for a mistrial based on the failure to produce witness statements because there was no evidence that the statements were lost or misplaced due to bad faith on the state's part; any argument that the statements might have aided the defense or provided a basis to impeach the state's witnesses was simply speculative; defense counsel was able to use the statements' absence to attempt to undermine a deputy's credibility at trial; and granting a mistrial would not be just under the circumstances, especially since there was no evidence in the record that the statements might yet be found and thus potentially alter the defendant's strategy in a new trial. Burton v. State, 330 Ga. App. 503, 767 S.E.2d 510 (2014).

Trial court did not err in denying the defendant's motion for a mistrial based on the prosecutor's misconduct in failing to disclose the statement the defendant made to the first investigator until eliciting testimony about the statement from the first investigator at trial because the undisclosed statement that the defendant made to the first investigator was the same in substance as the defendant's longer, more detailed, and audio-recorded statement to the second investigator, which was properly disclosed to the defendant and was played for the jury at trial; and trial counsel admitted that the first investigator's testimony did not provide any information from the defendant that

had not already been disclosed in discovery. Prince v. State, 295 Ga. 788, 764 S.E.2d 362 (2014).

Failure to request relief.

Defendant failed to show prejudice as a result of the trial court's failure to exclude testimony of the surviving victim based on an alleged discovery violation because, inter alia, the defendant did not seek a recess or continuance or seek any other remedy under O.C.G.A. § 17-16-6. Falay v. State, 320 Ga. App. 781, 740 S.E.2d 738 (2013).

Testimony properly admitted. — Despite the fact that the state failed to notify the defendant of a similar transaction action witness more than 10 days before trial, the admission of the testimony was not erroneous as the prosecutor indicated that the defense was informed of the witness as soon as the prosecutor got the evidence and defense counsel was given an opportunity to interview the witness prior to the witness's testimony. Johnson v. State, 322 Ga. App. 612, 744 S.E.2d 903 (2013).

17-16-7. Statements of witnesses.

JUDICIAL DECISIONS

Failure of the state to produce oral statements.

Admission of a witness's testimony regarding the defendant's oral statement that someone had put something in the defendant's drink was not error as the statement was oral and subject to the disclosure requirements of O.C.G.A. § 17-16-7 and, even assuming there had been error, it was harmless given the other evidence in the case. Simmons v. State, 321 Ga. App. 743, 743 S.E.2d 434 (2013).

Statutory obligation of O.C.G.A. § 17-16-7 was not triggered when a witness merely made an oral statement and thus, the state was not obliged to inform the defendant that the victim had been taken for a medical exam until the state received written confirmation of the exam. Whatley v. State, 326 Ga. App. 81, 755 S.E.2d 885 (2014).

No duty to disclose.

Defendant's contention that trial counsel was ineffective for failing to move to suppress the identification by a victim prior to trial, object to the in-court identification of the defendant, or move for a mistrial because the state allegedly failed to provide notice that the victim could identify the defendant failed because the defendant knew the victim before the armed robbery, thus, there was an independent basis for the in-court identification, making futile any objection to the testimony. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

CHAPTER 17

CRIME VICTIMS' BILL OF RIGHTS

17-17-3. Definitions.

As used in this chapter, the term:

(1) "Accused" means a person suspected of and subject to arrest for, arrested for, or convicted of a crime against a victim.

(1.1) "Arrest" means an actual custodial restraint of a person or the person's submission to custody and includes the taking of a child into custody.

(2) "Arresting law enforcement agency" means any law enforcement agency, other than the investigating law enforcement agency, which arrests the accused.

(3) "Compensation" means awards granted by the Georgia Crime Victims Compensation Board pursuant to Chapter 15 of this title.

(4) "Crime" means an act committed in this state which constitutes any violation of Chapter 5 of Title 16; Chapter 6 of Title 16; Article 1, 3, or 4 of Chapter 7 of Title 16; Article 1 or 2 of Chapter 8 of Title 16; Chapter 9 of Title 16; Part 3 of Article 3 of Chapter 12 of Title 16; Code Section 40-6-393; Code Section 40-6-393.1; or Code Section 40-6-394.

(4.1) "Criminal justice agency" means an arresting law enforcement agency, custodial authority, investigating law enforcement agency, prosecuting attorney, or the State Board of Pardons and Paroles.

(5) "Custodial authority" means a warden, sheriff, jailer, deputy sheriff, police officer, correctional officer, officer or employee of the Department of Corrections or the Department of Juvenile Justice, community supervision officer or employee of the Department of Community Supervision, or any other law enforcement officer having actual custody of the accused.

(6) "Investigating law enforcement agency" means the law enforcement agency responsible for the investigation of the crime.

(7) "Notice," "notification," or "notify" means a written notice when time permits or, failing such, a documented effort to reach the victim by telephonic or other means.

(8) "Person" means an individual.

(9) "Prompt notice," "prompt notification," or "promptly notify" means notification given to the victim as soon as practically possible so as to provide the victim with a meaningful opportunity to exercise his or her rights pursuant to this chapter.

(10) "Prosecuting attorney" means the district attorney, the solicitor-general of a state court or the solicitor of any other court, the Attorney General, a county attorney opposing an accused in a habeas corpus proceeding, or the designee of any of these.

(11) "Victim" means:

(A) A person against whom a crime has been perpetrated or has allegedly been perpetrated; or

(B) In the event of the death of the crime victim, the following relations if the relation is not either in custody for an offense or the defendant:

(i) The spouse;

(ii) An adult child if division (i) does not apply;

(iii) A parent if divisions (i) and (ii) do not apply;

(iv) A sibling if divisions (i) through (iii) do not apply; or

(v) A grandparent if divisions (i) through (iv) do not apply; or

(C) A parent, guardian, or custodian of a crime victim who is a minor or a legally incapacitated person except if such parent, guardian, or custodian is in custody for an offense or is the defendant. (Code 1981, § 17-17-3, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 1996, p. 748, § 17; Ga. L. 1997, p. 1453, § 1; Ga. L. 2010, p. 214, § 7/HB 567; Ga. L. 2013, p. 524, § 3-1/HB 78; Ga. L. 2015, p. 422, § 5-40/HB 310.)

The 2015 amendment, effective July 1, 2015, inserted "community supervision officer or employee of the Department of Community Supervision," in paragraph (5). See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

17-17-7. Notification to victim of accused's arrest and proceedings where accused's release is considered; victim's right to express opinion in pending proceedings and to file written complaint in event of release.

(a) Whenever possible, the investigating law enforcement agency shall give to a victim prompt notification as defined in paragraph (9) of Code Section 17-17-3 of the arrest of an accused.

(b) The arresting law enforcement agency shall promptly notify the investigating law enforcement agency of the accused's arrest.

(c) Whenever possible, the prosecuting attorney shall notify the victim prior to any proceeding in which the release of the accused will be considered.

(d) Whenever possible, the prosecuting attorney shall offer the victim the opportunity to express the victim's opinion on the release of the accused pending judicial proceedings.

(e)(1) Whenever possible, the custodial authority shall give prompt notification to a victim of the release of the accused.

(2) Prompt notification of release from a county or municipal jail is effected by placing a telephone call to the telephone number provided by the victim and giving notice to the victim or any person answering the telephone who appears to be sui juris or by leaving an appropriate message on a telephone answering machine.

(3) Notification of release from the custody of the state or any county correctional facility shall be in the manner provided by law.

(f) If the court has granted a pretrial release or supersedeas bond, the victim shall have the right to file a written complaint with the prosecuting attorney asserting acts or threats of physical violence or intimidation by the accused or at the accused's direction against the victim or the victim's immediate family. Based on the victim's written complaint or other evidence, the prosecuting attorney may move the court that the bond or personal recognizance of an accused be revoked. (Code 1981, § 17-17-7, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2014, p. 866, § 17/SB 340.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, redesignated the introductory text of subsection (e) as paragraph (e)(1) and paragraphs (e)(1) and (e)(2) as paragraphs (e)(2) and (e)(3), respectively.

17-17-8. Notification by prosecuting attorney of legal procedures and of victim's rights in relation thereto; victims seeking restitution.

(a) Upon initial contact with a victim, a prosecuting attorney shall give prompt notification to the victim of the following:

(1) The procedural steps in processing a criminal case including the right to restitution;

(2) The rights and procedures of victims under this chapter;

(3) Suggested procedures if the victim is subjected to threats or intimidation;

(4) The names and telephone numbers of contact persons at both the office of the custodial authority and in the prosecuting attorney's office; and

(5) The names and telephone numbers of contact persons at the office of the investigating agency where the victim may make application for the return of any of the victim's property that was taken during the course of the investigation, as provided by Code Section 17-5-50.

(b) If requested in writing by the victim and to the extent possible, the prosecuting attorney shall give prompt advance notification of any scheduled court proceedings and notice of any changes to that schedule. Court proceedings shall include, but not be limited to, pretrial commitment hearings, arraignment, motion hearings, trial, sentencing, restitution hearings, appellate review, and post-conviction relief. The prosecuting attorney shall notify all victims of the requirement to make such request in writing.

(c)(1) In the event the victim seeks restitution, the victim shall provide the prosecuting attorney with his or her legal name, address, phone number, social security number, date of birth, and, if the victim has an e-mail address, his or her e-mail address. The victim shall also provide such information, other than a social security number, to the prosecuting attorney for a secondary contact person in the event the victim cannot be reached after reasonable efforts are made to contact such victim. The prosecuting attorney shall advise the victim of any agency that will receive such information and advise the victim that he or she is responsible for updating such information with the prosecuting attorney while the case involving the victim is pending and that he or she should update the agency with such information after a restitution order has been entered.

(2) The prosecuting attorney shall transmit the information collected in paragraph (1) of this subsection to the Department of Corrections, Department of Community Supervision, Department of Juvenile Justice, or the State Board of Pardons and Paroles, as applicable, if an order of restitution is entered.

(3) The information collected pursuant to paragraph (1) of this subsection shall be treated as confidential and shall not be disclosed to any person outside of the disclosure provided by this subsection; such information shall not be subject to Article 4 of Chapter 18 of Title 50, relating to open records, or subject to subpoena, discovery, or introduction into evidence in any civil or criminal proceeding. (Code 1981, § 17-17-8, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2010, p. 214, § 10/HB 567; Ga. L. 2015, p. 422, § 5-41/HB 310.)

The 2015 amendment, effective July 1, 2015, inserted "Department of Community Supervision," in paragraph (c)(2). See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

17-17-9. Exclusion of testifying victim from criminal proceedings; separate victims' waiting areas.

(a) A victim has the right to be present at all criminal proceedings in which the accused has the right to be present. A victim or member of the immediate family of a victim shall not be excluded from any portion of any hearing, trial, or proceeding pertaining to the offense based solely on the fact that such person is subpoenaed to testify unless it is established that such victim or family member is a material and necessary witness to such hearing, trial, or proceeding and the court finds that there is a substantial probability that such person's presence would impair the conduct of a fair trial. The provisions of this Code section shall not be construed as impairing the authority of a judge to remove a person from a trial or hearing or any portion thereof for the same causes and in the same manner as the rules of court or law provides for the exclusion or removal of the accused. A motion to exclude a victim or family members from the courtroom for any reason other than misconduct shall be made and determined prior to jeopardy attaching.

(b) A victim of a criminal offense who has been or may be subpoenaed to testify at such hearing or trial shall be exempt from the provisions of Code Section 24-6-615 requiring sequestration; provided, however, that the court shall require that the victim be scheduled to testify as early as practical in the proceedings.

(c) If the victim is excluded from the courtroom, the victim shall have the right to wait in an area separate from the accused, from the family and friends of the accused, and from witnesses for the accused during any judicial proceeding involving the accused, provided that such separate area is available and its use in such a manner practical. If such a separate area is not available or practical, the court, upon request of the victim made through the prosecuting attorney, shall attempt to minimize the victim's contact with the accused, the accused's relatives and friends, and witnesses for the accused during any such judicial proceeding. (Code 1981, § 17-17-9, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2010, p. 214, § 12/HB 567; Ga. L. 2011, p. 99, § 35/HB 24; Ga. L. 2014, p. 866, § 17/SB 340.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, substituted "Code Section 24-6-615" for "Code Section 24-6-616" in subsection (b).

17-17-13. Notification to victim of impending parole, release for period exceeding 60 days, or pardon; notice of hearing on request to commute death sentence.

The State Board of Pardons and Paroles shall give 20 days' advance notification to a victim whenever it considers making a final decision to grant parole, release a defendant for a period exceeding 60 days, or grant a pardon; and the board shall provide the victim with an opportunity to file a written objection to such action. Within 72 hours of receiving a request to commute a death sentence, the State Board of Pardons and Paroles shall provide notification to a victim of the date set for hearing such request and provide such victim an opportunity to file a written response to such request. No notification to the victim need be given unless the victim has expressed a desire for such notification and has provided the State Board of Pardons and Paroles with a current mailing or e-mail address and telephone number. Failure of the victim to inform the board of a change of address or telephone number shall not void a decision of the board. (Code 1981, § 17-17-13, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2015, p. 207, § 1/HB 71.)

The 2015 amendment, effective July 1, 2015, in the first sentence, inserted a comma following "parole", deleted "or any other manner or executive clemency action" preceding "release a defendant" and inserted ", or grant a pardon"; added the present second sentence; and in the third sentence, inserted "to the victim" near the beginning, deleted "objection to release or has expressed" preceding "a desire" near the middle, and inserted "mailing or e-mail" near the end; and added the last sentence.

17-17-14. Victim required to provide current address and phone number to notifying parties.

(a) It is the right and responsibility of the victim who desires notification under this chapter or under any other notification statute to keep the following informed of the victim's current address and phone number:

(1) The investigating law enforcement agency;

(2) The prosecuting attorney, until final disposition or completion of the appellate and post-conviction process, whichever occurs later;

(3) As directed by the prosecuting attorney, the sheriff if the accused is in the sheriff's custody for pretrial, trial, or post-conviction proceedings; the Department of Corrections if the accused is in the custody of the state; or any county correctional facility if the defen-

dant is sentenced to serve time in a facility which is not a state facility;

(4) The Department of Community Supervision; and

(5) The State Board of Pardons and Paroles.

(b) Current addresses and telephone numbers of victims and their names provided for the purposes of notification pursuant to this chapter or any other notification statute shall be confidential and used solely for the purposes of this chapter and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50, relating to inspection of public records. (Code 1981, § 17-17-14, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2014, p. 866, § 17/SB 340; Ga. L. 2015, p. 422, § 5-42/HB 310.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, deleted "and" at the end of paragraph (a)(2).

The 2015 amendment, effective July 1, 2015, deleted "and" from the end of paragraph (a)(3); redesignated former paragraph (a)(4) as present paragraph (a)(5); and added new paragraph (a)(4). See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

CHAPTER 19

GEORGIA COUNCIL ON CRIMINAL JUSTICE REFORM

17-19-1. (Repealed effective June 30, 2018) Creation; purpose.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013). For annual survey on criminal law, see 66 Mercer L. Rev. 37 (2014).

17-19-2. (Repealed effective June 30, 2018) Membership; terms; chairperson; staff support; funds.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

17-19-3. (Repealed effective June 30, 2018) Meetings; quorum; expense allowances.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

17-19-4. (Repealed effective June 30, 2018) Duties; powers.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

17-19-5. Sunset.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

CHAPTER 20

IDENTIFICATION PROCEDURES FOR LIVE LINEUPS, PHOTO LINEUPS, AND SHOWUPS

Effective date. — This chapter becomes effective July 1, 2016.

17-20-1. (Effective July 1, 2016) Definitions.

As used in this chapter, the term:

(1) "Fillers" means individuals who are not suspects.

(2) "Law enforcement agency" means a governmental unit of one or more individuals employed full time or part time by the state, a state agency or department, or a political subdivision which performs as its principal function activities relating to preventing and detecting crime and enforcing state laws or local ordinances, employees of which unit are authorized to make arrests for crimes while acting within the scope of their authority.

(3) "Live lineup" means an identification procedure in which a suspect and fillers are displayed in person to a witness.

(4) "Photo lineup" means an identification procedure in which a photograph of a suspect and photographs of fillers are displayed to a witness, either in hard copy form or via computer.

(5) "Showup" means an identification procedure in which a witness is presented with a single individual.

(6) "Suspect" means the individual believed by law enforcement to be the possible perpetrator of an alleged crime.

(7) "Witness" means an individual who observes an alleged crime. (Code 1981, § 17-20-1, enacted by Ga. L. 2015, p. 1046, § 4/SB 94.)

17-20-2. (Effective July 1, 2016) Written policies for live line-ups, photo line-ups, and showups.

(a) Not later than July 1, 2016, any law enforcement agency that conducts live lineups, photo lineups, or showups shall adopt written policies for using such procedures for the purpose of determining whether a witness identifies someone as the perpetrator of an alleged crime.

(b) Live lineup, photo lineup, and showup policies shall include the following:

(1) With respect to a live lineup, having an individual who does not know the identity of the suspect conduct the live procedure;

(2) With respect to a photo lineup, having an individual:

(A) Who does not know the identity of the suspect conduct the photo lineup; or

(B) Who knows the identity of the suspect use a procedure in which photographs are placed in folders, randomly shuffled, and then presented to the witness so that the individual conducting such procedure cannot physically see which photograph is being viewed by the witness until the procedure is complete;

(3) Providing the witness with instruction that the perpetrator of the alleged crime may or may not be present in the live lineup or photo lineup;

(4) Composing a live lineup or photo lineup so that the fillers generally resemble the witness's description of the perpetrator of the alleged crime;

(5) Using a minimum of four fillers in a live lineup and a minimum of five fillers in a photo lineup; and

(6) Having the individual conducting a live lineup, photo lineup, or showup seek and document, at the time that an identification of an individual or photograph is made, and in the witness's own words without necessarily referencing a numeric or percentage standard, a clear statement from the witness as to the witness's confidence level that the individual or photograph identified is the individual or photograph of the individual who committed the alleged crime.

(c) All law enforcement agency written policies adopted pursuant to this Code section shall be subject to public disclosure and inspection notwithstanding any provision to the contrary in Article 4 of Chapter 18 of Title 50. (Code 1981, § 17-20-2, enacted by Ga. L. 2015, p. 1046, § 4/SB 94.)

17-20-3. (Effective July 1, 2016) Effect of failure to comply with requirements of this chapter.

The court may consider the failure to comply with the requirements of this chapter with respect to any challenge to an identification; provided, however, that such failure shall not mandate the exclusion of identification evidence. (Code 1981, § 17-20-3, enacted by Ga. L. 2015, p. 1046, § 4/SB 94.)